Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [05/08/90]

CASE NBR: [89106679] CFH STATUS: [ ]
SHORT TITLE: [Swindler, John E.]
VERSUS [Lockhart, Dir., Arkansas DOC] DATE DOCKETED: [012690]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jan 26 1990		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Feb 28 1990		Brief of respondent A. L. Lockhart in opposition filed.
Mar 8 1990		DISTRIBUTED. March 23, 1990
Mar 21 1990		Record requested.
Apr 3 1990		Record filed.
Apr 5 1990		REDISTRIBUTED. April 20, 1990
Apr 6 1990		Record filed.
Apr 23 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)
		**********
May 2 1990		Record returned to USCA for the 8th Circuit.
May 3 1990		Record returned USDC Eastern Arkansas

ORIGINAL

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1989

89-6679

JOHN EDWARD SWINDLER, PETITIONER
VS.
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT

No

RECEIVED
JAN 26 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the petitioner, John Edward Swindler, by his attorney, Thurman Ragar, Jr., a member of the bar of this court, and moves the court for an order permitting the petitioner, John Edward Swindler, to proceed herein in forma pauperis and for his motion states:

1. The petitioner, John Edward Swindler, is a prisoner, incarcerated in the Arkansas Department of Corrections with a sentence of death and is without funds, to pay the costs herein.

2. The petitioner, John Edward Swindler, sought and was granted leave to proceed in forma pauperis by the United States District Court for the Eastern District of Arkansas and by the United States Court of Appeals for the Eighth Circuit.

WHEREFORE, the petitioner, John Edward Swindler, prays that an order granting the petitioner, John Edward Swindler, leave to proceed in forma pauperis, be granted and all other relief as to the court may be deemed proper and proper. BELOW COUNSEL WAS APPOINTED PURSUANT TO THE CRIMINAL JUSTICE ACT, 3006A.

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

Thurman Ragar, Jr.

92 pp

ORIGINAL

89-6679

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER, PETITIONER

VS.

No _____

A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

PETITION OF JOHN EDWARD SWINDLER FOR A WRIT OF CERTIORARI

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

QUESTIONS PRESENTED FOR REVIEW

1. Effective assistance of counsel?

A. Is constitutionally effective assistance of counsel rendered by trial counsel:

(1) when counsel presents no mitigation evidence, in the punishment phase of the petitioner's second capital murder trial even though counsel, because of his experience, was of the opinion that the sentence in the petitioner's second trial would be the same as in the first trial--- death;

(2) when, not withstanding his opinion of the jury's verdict, trial counsel made no investigation of the possibilities of mitigation evidence, even though the report of the mental examination by the State Hospital of the petitioner showed the petitioner to be an "antisocial personality".

B. Is effective assistance of counsel rendered when the petitioner's trial counsel fails to make an adequate record by failing to follow statutory procedures to obtain a change of venue when the certainty of that issued to be raised on appeal was apparent.

2. Was Ark. Code § 61-88-207 unconstitutionally applied to the petitioner in the granting of only one change of venue when prejudicial pretrial publicity was revealed during voir dire in violation of the petitioner's rights under the 6th and 14th Amendments.

3. Did the trial court use an unconstitutional standard of the opinion in permitted of jurors, in permitting veniremen who expressed an opinion that the petitioner was guilty of the charge to be seated as jurors?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

A REFERENCE TO THE OFFICAL & UNOFFICAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS BELOW

1. The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, is found in the Appendix at page 1.

2. The order of the Court of Appeals for the Eighth Circuit dated December 19, 1990 is found in the Appendix at page 23

3. The opinion of the United States District Court for the Eastern District of Arkansas, not yet reported, is found in the Appendix at page 24.

4. The opinion of the Supreme Court of Arkansas overruling the petitioner's post appeal, post conviction petition, **Swindler v. State,** 272 Ark. 340, 617 SW2nd. 1, is found in the Appendix II.

5. The opinion of the Supreme Court of Arkansas on the direct appeal of the petitioner's second trial, **Swindler v. State**, 267 Ark. 418, 592 SW2nd. 91, is found in the Appendix III.

6. The opinion of the Supreme Court of Arkansas on the direct appeal of the petitioner's first trial. **Swindler v. State**, 264 Ark. 107, 569 SW2nd. 120, is found in the Appendix IV.

7. The Arkansas State Hospital Psychological Evaluation of John Swindler # 10-76-43, Appendix V

8. Testimony of Hon. Don Langston, Hearing before Judge Henry Woods, Febraury 2, 1987, Appedix VI

9 A. Voir Dire of Thomas Bricksey [Trial Transcipt 1291-1318] Apppendix VII
B. Voir Dire of Henry Sunderman [Trial Transcript 971-985]
C. Voir Dire of Thuman Jones [Trial Transcipt 1146-1185]
D. Voir Dire of Milton Stags [Trial Transcipt 1222-1241]

JURISDICTIONAL STATEMENT

1. (a.) The Court of Appeals for the Eighth Circuit rendered its decision in this case on September 26, 1989.

(b.)The petitioner's motion for rehearing was denied. November 27, 1989.

(c.) The mandate of the Court of Appeals was recalled on December 19, 1989, reinstating the stay of execution pending the filing of the a petition for a writ of certiorari with this court by and until January 26, 1990.

2. This court has jurisdiction pursuant to 28 U.S.C §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 6 to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

Amendment 14 § 1 to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254 (d)

In any proceeding instituted in Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the application for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State Court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, after the Federal court on a consideration of such part of the record as a whole

concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Art. 2 § 9 Constitution of Arkansas.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found; upon the application of the accused, in such manner as not is, or may be, prescribed by law;...

Ark Code § 5-4-605

Mitigating circumstances shall include but not limited to the following:

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder.

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) The defendant has no significant history of prior criminal activity.

Ark. Code § 16-33-305(b)

(b) The defendant hall be entitled to twelve (12) peremptory challenges in prosecutions for capital murder, to eight (8) premeptory challenges in prosecutions for all other felonies and to three (3) peremptory challenges in prosecutions for misdemeanors.

Ark. Code § 16-88-204

(a) The application of the defendant for an order or removal shall be by petition setting forth the facts on account of which the removal is requested. The truth of the allegations in the petition shall be supported by the affidavits of two (2) credible persons who are qualified electors, actual residents of the county, and not related to the defendant in any way.

(1) Reasonable notice of the application shall be given to the prosecuting attorney.

(2) The Court shall hear the application and, after considering the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and, after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

(b) Every order for the removal of a criminal cause under the provisions of this subchapter shall state whether the order is made on the application of the party, or on facts within the knowledge of the court or judge making the order, and shall specify the cause of removal, and designate the county to which the cause is to be removed.

(c) The order, if made in term time, shall be entered on the record of the proceedings of the court. If made by judge in vacation, the order shall be in writing and be signed by the the judge and shall be filed by the clerk with the petition, if any, as a part of the record.

Ark. Code § 16-88-207

In no case shall a second removal of the same cause be allowed.

STATEMENT OF CASE

John Swindler, was convicted in the Circuit Court of Scott County, Arkansas for the Capital Felony Murder killing a Fort Smith, Arkansas policeman. The jury fixed Swindler's sentence at death.

Swindler had been previously tried in the Circuit Court of Sebastian County, Arkansas and convicted and sentenced to death. The first conviction was overturned by the Arkansas Supreme Court in the **Swindler v. State**, 264 Ark. 107 569 SW 2nd. 120 (1978) because the trial court had refused to grant Swindler's motion for a change of venue and three jurors had been improperly allowed to set on the jury.

There had been extensive media coverage of the murder of the police officer, Swindler's arrest, and Swindler's background which included his prison record and information on his being wanted by South Carolnia authorities for the wanton murder of two teenagers. Swindler was represented at both trials by two public defenders. Lead counsel was an experinced trail attorney with 50 to 60 jury trials.

The evidence was undisputed that the police officer was killed by Swindler.

Scott County is the county immediately south of Sebastian County. The County seat, Waldron, is about 45 miles south of Fort Smith. Scott County is a rural county of approximately 8500 inhabitants. There or no televisions stations or daily newspapers published in Scott county. The news media of Fort Smith is the primary news media of Scott county. Trial counsel undertook no investigation of the possible prejudice against Swindler in Scott County prior to the trail, for purpose of filing of a motion for a change of venue. Trial counsel had talked with the sheriff of Scott County and the Clerk of the Court and in their opinion there was strong unfavorable opinion of Swindler, about the same as in Sebastian County.

The voir dire exmination of the jury lasted five days. Swindler's lawyers moved on six occasions for a mistrial to move the trial to another county because of prejudicial pretrial publicity and jury prejudice, the last motion being made after the jury was chosen based upon the voir dire. Swindler exhausted his peremptory challenges. 120 veniremen were examined in the selection of the twelve jurors and one alternate. 79 veniremen were excused for cause. Of these 79, four were excused because of opposition to the death penalty.

Three veniremen had been challanged for cause by Swindler, but were seated anyway. All three stated that he felt Swindler guilty. One stated that he could not assure the court that is prior opinion would not influence his deliberations as a juror. One stated as a result of information received from the media and the result of the first trial, he believed Swindler guilty, but he would try to follow the judges's instructions, but he could not errase something from his mind. One stated that his opinion would be that it would have to turn out like the first trial.

During the guilt phase of the trial Swindler presented no evidence or testimony in mitigation of the death sentenece.

Swindler appealed again to the Supreme Court of Arkansas. The Arkansas Supreme Court affirmed the judgment and sentence of the second trial. Swindler exhaused his state court post-conviction remedies and filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Arkansas pursuant to 28 U.S.C §§ 2242 and 2254. In his petition he alledged six grounds for relief. Three of those grounds are brought forth in this petition.

At the hearing on Swindler's habeas coprus petition Swindler's trial attorney, testified that he was familar

with the ruling in **Irwin v. Dowd,** and the Arkansas laws concering change of venue, but he under took no steps to prepare a motion for a change of venue. Thus there was no record of any prejudicical pretrial publicity.

He had a pretty good idea of the nature of the state's case and the evidence which would be presented and as experenced trial attorney felt that with that evidence, the outcome of the second trial was very likely to be the same as the first trial. Eventhough, he hoped for a different result in the penalty phase of the trial, he realized that there was a high likelihood that the death penatly would be imposed again by the jury. Swindler had had a pyschiatric examation at the State Hospital prior to the first trial, he did not undertake any investigation of any circumstances which could be offered in mitigation to the agrivating circumstances the state would offer. The State Hospital report indicated that Swindler was a "antisoical personality".

Swindler had told his lawyer about mental problems he (Swindler) had had since his youth. Swindler testifed that he been in trouble with the law since he was about 14 years of age. He had spent most of his life since then in one penal institution or another. During these incarcerations he was subjected to numerous psychological and psychiatric examations by the authorities who held him. One of the reason a for a light sentence when he was sentenced by a South Carolina Court was the evaluation at the State Hospital in South Carolina. He had brought these evaluations to the attention of his lawyer. He testifed that in 1951 or 1952 when was a child he fell off a bridge and was knocked unconsious for two days.

The District Court denied the Swindler's petition for a Writ of Habeas Corpus, and that order denyning the writ was affirmed by the Court of Appeals for the Eighth Circuit.

ARGUMENT

1. Effective assistance of counsel?

Petitioner does not contend that his trial counsel was incompetent. Petitioner does contend they were constitutionally ineffective. He has been prejudiced by the ineffective assistance of counsel. Competent counsel may on occasion render constitutionally ineffective assistance of counsel. It happened in Swindler's trial in Scott County Arkansas.

A. Is constitutionally effective assistance of counsel rendered by trial counsel:

(1) when counsel presents no mitigation evidence, in the punishment phase of the petitioner's second capital murder trial even though counsel, because of his experience, was of the opinion that the sentence in the petitioner's second trial would be the same as in the first trial--- death;

(2) when, not withstanding his opinion of the jury's verdict, trial counsel made no investigation of the possibilities of mitigation evidence, even though the report of the mental examination by the State Hospital of the petitioner showed the petitioner to be an "antisocial personality".

No evidence was presented by Swindler in the penalty phase of his capital murder trial. Trial Counsel admitted at the habeas corpus hearing of this case that he had a pretty good idea of the results of the trial would be the same as the first trial. A guilty verdict and a death sentence.

The lead trial counsel was an experienced attorney who handled during the six years he had been a public defender 50 or 60 jury trials, including Swindler's first trial which had been reversed by the Supreme Court of Arkansas. Counsel knew the evidence the State would produce. It would not be greatly different that the evidence produced in the first trail. The reversal in the Supreme Court did not result in the exclusion of any evidence which had been presented in the first trial.

Given the State's evidence, the primary goal in his defense of Swindler would be to avoid the death penalty. Trial counsel made no investigation whatsoever to prepare for the penalty phase of the trial.

Plenty of avenues presented themselves to mitigate the death sentence. Swindler testified at the habeas corpus hearing that he had had during his youth a serious head injury. He had been examined by numerous professionals in the mental health field during his years of incarceration, but trial counsel made no attempt to obtain those records, to obtain any information about his client.

Swindler had been examined by the Arkansas State Hospital shortly after his arrest. That report was filed with the trial court. The report contained information that Swindler had "personality defects" and was an "antisocial personality". Swindler's lawyers did not communicate with any of the State Hospital professionals who had examined Swindler to explore the possibilities that Swindler might have some mental or emotional disturbance or defect which could have been evidence of mitigation.

The report of the State Hospital focused on Swindler's mental condition at the time of his arrest to determine if he were competent to stand trial and to determine if he was suffering from insanity which would be a defense to the charge. The psychologial evidence offered as defense to charge and offered in mitigation to death penalty are not the same.

In the penalty phase of the trial, evidence which may be offered in mitigation includes any mental disease or defect and intoxication, Ark. Code § 5-4-605(3).

Swindler testified that he had drunk a six pack of beer and some vodka during the afternoon before he arrived in Fort Smith. Intoxication can be a mitigating circumstance.

The District Court's statement denoting Swindler's trial

counsel actions as "trial strategy", accepted by the Eighth Circuit is not supported by the record.

Trial strategy is developed after the lawyer has familiarized himself with the case and carefully studied the facts and applicable law. In a capital case this will often involve two different preparations and strategies, for the issues and burdens of proof are not the same. Nothing was done in preparation for the penalty phase which could have been offered in mitigation to achieve the primary goal of his defense of Swindler, to save his life.

Lead trial counsel had lived in Western Arkansas for several years. His office was in Fort Smith. No investigation was made of the attitudes of the people of Scott County towards Swindler, except some conversations with the Sheriff and the court clerk shortly before the trial which only confirmed his gut feeling that the attitudes of the citizens of Scott County were no different than attitudes of the citizens Sebastian County.

No motion for change of venue was filed to have the trial moved further from Fort Smith until after the voir dire of the jury began. That motion was a oral motion not in compliance with the statue.

Ark. Code § 16-88-204 sets forth the procedure to obtain a change of venue. First the defendant makes application by a petition for a change of venue, setting forth the facts to support the removal. With the petition the defendant must attach at least two affidavits of creditable persons, registered to vote, not related to the defendant and actual residents of the county. Second, the defendant must give "reasonable notice" to the prosecution. The court then has a hearing and the state can produce counter affidavits and either party can call witnesses. The proceedings are part of the record. Trial counsel was familiar with the procedure. It was on the

record he made by in the first trial that the Arkansas Supreme Court found prejudicial pretrial publicity and ordered a new trial.

With over a hundred citizens setting in the courtroom and halls of the courthouse awaiting the voir dire, it was a little late to move for a change of venue. One can imagine easily the reaction of the trial court to such a motion. The effectiveness of counsel does not begin when he walks into the courtroom. There must be preparation beforehand. A record must be made for an appeal, should one be needed.

Counsel was familiar with the law set forth in **Irvin v. Dowd**, 366 U.S. 717 as to what must be shown to show prejudice.

The District Court found that there was not ineffective assistance of counsel in failing to follow the correct procedure to obtain a change of venue, because the trial court addressed the motions and considered the motions on the merits and found no basis for a change of venue. The Supreme Court of Arkansas in **Swindler v. State**, 267 Ark. 418, 592 SW2nd. 91 held otherwise. The Arkansas Supreme Court stated:

> [N]o evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as result of the killing was offered...
>
> Our law provides affidavits or sworn testimony must be offered in support of a motion for a change of venue.
>
> The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined, at p 94.

The District Court's finding, accepted by the Eighth Circuit is a <u>non sequitur</u>. The fallacy in the District Court's finding is that the issue is: the effectiveness of legal representation of the defense counsel; not whether the motion for change of venue should have been granted. Neither the District Court nor the Court of Appeals court address the issue. The issue is the failure to made a record. The

Arkansas Supreme Court did not even get to the question of whether a change of venue should have been granted, because none had been requested in the manner provided in the statutes. The finding of the Supreme Court of Arkansas, that there was no record is entitled pursuant to 28 U.S.C. § 2554 (d) to a presumption of correctness.

In **Strickland v. Washington**, 466 U.S. 668 (1968) the court sets forth the two rules which must be met before a conviction or a sentence of death can be set aside because of ineffective counsel, those rules are:

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results are reliable. at p 2064.

The Supreme Court did not state and has not stated that "ineffective" counsel which fails to meet the standards required by the Sixth Amendment is synonymous "incompetent" counsel. There are times when competent counsel can render legal services to a defendant in a criminal trial which are ineffective and fail to meet the standards required by the Sixth Amendment for effective counsel. It happened in Scott County Circuit Court in this case.

Strickland does not set forth a check list of steps taken by counsel to determine whether or not constitutionally effective counsel has been rendered. Such guidelines would, the court felt, be inappropriate.

Strickland involved the an allegation of ineffective assistance of counsel during the sentencing stage of a capital murder trial, much like the procedure used in Arkansas. The court stated:

> A capital sentencing proceeding like the one involved in this case, however, is sufficiently like

> a trial in its adversarial format and in the existence of standards for decision... that counsel' s role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under standards governing decision. at p 2064

While in **Strickland**, the court did not set forth set of rules to assess effectiveness of counsel, the court did in **United States v. Cronic**, 104 S. Ct. 2039, decided the same day as **Strickland** set forth some minimum standards for effective counsel. The court stated:

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process presumptively unreliable.

The court in footnote no. 26 in **Cronic** cites an Eighth Circuit case, **McQueen v. Swenson**, 498 F2nd. 207, (1974) in which the Court approved the manner in which specific errors were shown which undermined the reliability of the finding of guilt.

In **McQueen** the Eighth Circuit used the ABA Project of Standards for Criminal Justice "Standards Relating to the Prosecution Function and the Defense Function" as a starting point in assessing the effectiveness of counsel. 4.1 of those standards state:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to fact relevant to guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exist regardless of the accused 's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Swindler's counsel's conduct must be shown to be so deficient that there would be a reasonable probability that the outcome of the trial would have different had his lawyers not committed the default, **Strickland v. Washington**, supra The only outcome at issue here is the sentence. Death or not death.

Here as in **Cronic**, supra, there was a complete failure to subject the prosecution case during the penalty phase of the trail to any meaningful adversarial testing. There is therefore a presumption that Swindler was rendered constitutionally ineffective assistance of counsel, **Cronic**, supra.

When a jury is instructed, as they are, when they are asked by the state to return a sentence of death, that they must find "The aggravating circumstances outweight beyond a reasonable doubt any mitigating circumstances. (If you do not unanimously agree ... sentence the defendant to life imprisonment without parole."Arkansas Model Instructions, Criminal 1509 (b). The issue of how much error has to be committed before reasonable doubt is raised in the mind of one juror, so that there is a reasonable probability, that the sentence would not be death, is elusive.

2. Was Ark. Code § 16-88-207 unconstitutionally applied to the petitioner in the granting of only one change of venue when prejudicial pretrial publicity was revealed during the voir dire in violation of the petitioner's rights under the 6th and 14th amendments?

Ark Code § 16-88-207 states:

> In no case shall a second removal of the same cause be allowed.

The above quoted section must be read in conjunction with Section 10 of Article II of the Constitution of the State of Arkansas which provides ..."provided that the venue may be changed to any county of the judicial district in which the indictment is found...".

The Sixth Amendment is the starting point in the in-

quiry as to whether the defendant has had a fair trial. There is a the two prong inquiry into prejudice caused by pretrial publicity. The first is the nature and extent of the pretrial publicity. The second is the effect of the pretrial publicity on the venire panel from which the jury is selected. The Sixth Amendment does not require a jury composed of jurors ignorant of the facts. It requires a jury composed fair jurors.

A little more than one year before the trial in Scott County, Arkansas, Swindler had been tried in Sebastian County, Arkansas. His conviction was overturned by the Arkansas Supreme Court because of the failu e of the trial court to grant a change of venue, because of the prejudicial pretrial publicity. In the first trial 62 prospective jurors were questioned. 23 were excused for cause. The responses of the Sebastian County veniremen reported in first case are almost identical to the Scott County veniremen in the record in this case. If the case had been retired in Sebastian County and the responses from jury the same as in this record, would there be any doubt that a change of venue would have been required?

The Supreme Court stated in **Patton v. Yount**, 467 U.S. 1025 at 1035, "It is not unusual that one's recollection of the fact that notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed". While the court did not state the converse, logic does: that the prejudice created by the revulsion to a notorious crime can linger long. The operative term is prejudice. Prejudice once created in the hearts and minds of man lingers long, even after the event giving rise to that prejudice has been forgotten. The history of the republic, unfortunately, is evidence that prejudice can even stretch through generations.

Arkansas Code § 16-88-207 was enacted in 1873. 45 miles, the distance between Fort Smith and Waldron, was a great distance to travel then, taking perhaps two days. Communities were more insular. The occurrences in one county were not news in the next. Today 45 miles is meaningless in terms of prejudicial pretrial publicity. To move a trial from a county in which the Supreme Court of the Arkansas had found that it was impossible for Swindler to obtain a fair trial due to the prejudicial pretrial publicity, to an adjacent county the county seat of which was only 45 miles from the site of the first trial, does not serve the purpose of the granting of the change of venue. In reality Scott County is Sebastian County when the attitudes of the veniremen in this case are examined. To hold that line drawn on a map somehow separates the prejudiced veniremen from he unprejudiced veniremen is to engage in sophistry and to ignore reality.

Over three times as many jurors were excused for cause in Scott County than in Sebastian County.

The voir dire in the Scott County Circuit Court at Waldron lasted five days. 120 veniremen were examined (almost twice the number examined in Sebastian County); 79 were excused for cause.

Illustrative, is the voir dire of Venireman Thomas Bricksey whom the court refused to excuse for cause but did not serve because Swindler used a peremptory challenge. Venireman Bricksey was a life long resident of Scott County (he was 40 years old) he had read the news paper and saw the television news casts concerning the murder of Officer Basnett and remembered the first trial. He had discussed the the case with others and those persons had expressed opinions about the case. In response to the question, "Could you tell me what those opinions were? Did they think the defendant was guilty?"

Bricksey replied, "I am afraid it was almost unanimous."

Mr. Settle then asked, "Did you ever hear anybody state they thought he was not guilty?"

Bricksey: "No, sir."

The District Court and the Court of Appeals emphasized the length of time between the first trial and the second. But they ignored the first prong of the inquiry: the nature and extent of the pretrial publicity. Swindler was cop killer. He was felon on parole from federal prison, with a long line of convictions. He was accused of the brutal murder ot two South Carolina youths. He had been convicted once of this crime by a jury of 12 persons from just up the road. The nature of the crime and identity of the defendant insures that the mere passage of a relatively short period of time will not erase the prejudice against a cop killing federal parolee.

The record reflects a panel of citizens which is be a cross section of the community. An expensive poll conducted for the purpose of showing pretrial publicity would have revealed no more. The District Court 's finding: "The twoyear interim in Swindler's case suggest that the nature and extent of the publicity must surely have diminished along with the heat and hostility." is not supported by the record. The veniremen of Scott County were as prejudiced as those in Sebastian County.

3. Did the trial court use an unconstitutional standard of the opinion in permitted of jurors, in permitting veniremen who expressed an opinion that the petitioner was guilty of the charge to be seated as jurors?

Pursuant to Ark Code § 16-33-305 Swindler had twelve peremptory challenges. He excused his peremptory challenges when he excused Venireman John Montgomery after eleven jurors

had been seated. Of the eleven seated, three veniremen had been challenged for cause, but the seated over the objection of Swindler. They were Jurors, Henry Sunderman, Thurman Jones and Milton Staggs

Juror Sunderman stated that he had an opinion which he had stated to other persons that Swindler was guilty. He could not assure the court that his prior opinion would not influence his deliberations as a juror, but that he would weigh the evidence presented in the courtroom and not from the media.

Juror Jones stated that from the information he had received from the media and based upon the results of the first trial his opinion was that Swindler was guilty. He stated that he would follow the judge's instructions to the best of his ability but he could not erase something from his mind.

Juror Staggs stated that based upon he had heard he had a little bit of an opinion which was the that the trial would have to come out like the first trial. He stated that he would not have difficulty in setting aside his opinion.

In **Patton v. Yount**, 104 U.S. 1025, the court stated:

> The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinion that they could not judge impartially the guilt of the defendant. at p.1035.

It is apparent from the voir dire of the three jurors seated over the objections of Swindler, that the jurors had a fixed opinion of the petitioner's guilt and should have been excused for cause.

The District Court acknowledged that the three jurors in question had tentative opinions. Of course. That tentative opinion was that Swindler was guilty. The record does not support the District Court's assertion that the three jurors responses during the voir dire that they could judge the defendant solely on the evidence at the trial.

The responses of the jurors indicate that they would take those prejudices into the jury box.

The finding of the Scott County Circuit Court that the jurors were fit is based upon an unconstitutional standard, to wit: that a opinion of a venireman that the defendant is guilty may be held so long as venireman thinks he might be able to set aside that opinion. The constitutionality of this standard is a question of law and the District Court's deference to the trial court's finding pursuant to 28 U.S.C. § 2554(d) is error. The trail court's standard does not meet the standard set forth in **Adams v. Texas**, 488 U.S. 38, a venireman may not be seated as a juror when the venireman 's opinion...

> would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.

CONCLUSION

For the reasons set forth above, petitioner, John Edward Swindler, prays that this court grant to him a writ of certiorari directing the Court of Appeals for the Eighth Circuit to certify the record of this case to this court so that this court can rule on the issues raised herein, reverse the decision of the Court of Appeals for the Eighth Circuit and reverse the denial of the District Court petition for a Writ of Habeas Corpus and order the District Court to grant the Writ of Habeas Corpus and direct the State of Arkansas to retry the sentencing portion of the trial or reduce to Swindler's sentence to life in prison without parole.

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474-5994

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2387

John Edward Swindler,

Appellant,

v.

A. L. Lockhart, Commissioner of the Arkansas Dept. of Correction,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 12, 1989

Filed: September 26, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

John Edward Swindler appeals from the District Court's[1] denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

On September 24, 1976, Swindler, in flight from South Carolina where he was wanted for the murders of two teenagers, stopped off at a service station in Fort Smith, Arkansas apparently to ask directions to Kansas City. At the service station, Swindler was approached by Randy Basnett, a Fort Smith police officer. Swindler shot and killed Officer Basnett. Before he died, Basnett was able to fire five or six times through the car door injuring Swindler. Swindler was caught shortly thereafter.

Swindler was convicted of capital felony murder for the shooting death of Officer Basnett, and was sentenced to death. The Supreme Court of Arkansas overturned that conviction because the trial court erroneously refused to grant a change of venue from Sebastian County, the situs of the killing, and because the trial court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978).

Swindler was retried in Scott County, Arkansas, which adjoins Sebastian County, and convicted of capital felony murder for the second time and sentenced to death. The second conviction and death sentence were affirmed by the Supreme Court of Arkansas. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057 (1980). Subsequently, Swindler sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. This relief also was denied by the Supreme Court of Arkansas. Swindler v. State, 272 Ark. 340, 617 S.W.2d 1 (1981), cert. denied, 454 U.S. 933 (1981).

State post-conviction remedies thus exhausted, Swindler filed a writ of habeas corpus in the District Court pursuant to 28 U.S.C. §§ 2242 and 2254 alleging six grounds for relief: (1) a venireman was erroneously excluded after he voiced only general objections to the death penalty; (2) Swindler was improperly denied a second change of venue; (3) jurors biased against Swindler were seated against the objections of defense counsel; (4) Swindler was denied a continuance at the penalty phase of his

[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

trial to enable him to present a witness on his behalf; (5) an "aggravating circumstance" was erroneously considered by the jury during the penalty phase of his trial; and (6) Swindler was denied effective assistance of counsel at trial.

After a hearing, the District Court denied Swindler's petition. 693 F. Supp. 760 (E.D. Ark. (1988)). On appeal, Swindler repeats his six grounds for relief. Finding the claims meritless, we affirm the judgment of the District Court.

I.

Swindler contends that a member of the venire, Mr. Carmack, was excluded improperly after expressing only a general objection to the death penalty. We disagree.

In Wainwright v. Witt, 469 U.S. 412 (1985), the Supreme Court clarified the standard for determining when a prospective juror may be excluded for cause because of his view on capital punishment. Witt held that the proper test is whether the juror's views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The Court rejected the standard, taken from a footnote in Witherspoon v. Illinois, 391 U.S. 510, 522-3 (1969) n.21, that in order to exclude a juror for cause it must be "unmistakably clear" that the juror would "automatically" vote against the imposition of the death penalty.[2] Witt, 469 U.S. at 424-25. In this regard,

---

[2]The Supreme Court stated:

> We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is

this Circuit recently stated:

> We perceive the fundamental difference between Witherspoon and the Adams-Witt rule to be one of lessened degree as to the burden of proof. In order to exclude a juror under Witt the State no longer must show that it is unmistakably clear that the juror's opposition to capital punishment would automatically cause exclusion.

Hulsey v. Sargent, 865 F.2d 954, 956 (8th Cir. 1989) (footnote omitted).

Witt also clarified the degree of deference a federal habeas court must give to a state trial judge's determination that a potential juror's opposition to the death penalty is cause for exclusion. The Court stated:

> Last term, in Patton [v. Yount, 467 U.S. 1025 (1984)], we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact subject to §2254(d). We noted that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less." Id., at 1038.
>
> Patton's holding applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause.

> because determinations of jurors bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear[.]"

Witt, 469 U.S. at 424-25.

* * *

> Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, Patton must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the "factual issues" that are subject to §2254(d).

Witt, 469 U.S. at 428-29 (footnotes omitted). It follows from Patton and Witt that our task in this section 2254 case is to determine whether fair support exists in the record as a whole for the trial court's determination that Carmack's view on capital punishment would "prevent or substantially impair the performance of his duties as a juror." See Darden v. Wainwright, 477 U.S. 168, 176 (1986); Hulsey, 865 F.2d at 959.

The voir dire of Carmack was as follows:

Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?

A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to.

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way.

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

MR. KARR: I submit him for cause, Your Honor.

THE COURT: All right, Mr. Carmack, apparently what you are telling Mr. Karr is that you do oppose or have conscientious objections to the death penalty?

A: Right.

THE COURT: Now, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't.

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

(Tr. 1446-48). We conclude that the preceding voir dire provides ample support for the trial court's determination that Carmack should be excused because of his opposition to the death penalty. Therefore, we affirm the District Court's ruling that the trial court properly excluded this juror.[3] 693 F. Supp. at 763.

II.

Swindler next argues that the state trial court erred in denying his motion for a second change of venue. Swindler argues that he was entitled to a change of venue because of adverse

---

[3]Swindler's claim that Carmack expressed only general objections to the death penalty because he used words such as "believe" and "think" is unpersuasive when one reads the voir dire in its entirety. See Witt, 469 U.S. at 424-26, where the Supreme Court held that a potential juror's removal for cause was proper on the basis of the following voir dire:

> "[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
> "[A. Colby:] I am afraid personally but not--
> "[Q]: Speak up, please.
> "[A]: I am afraid of being a little personal, but definitely not religious.
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
> "[A]: I am afraid it would.
> "[Q]: You are afraid it would?
> "[A]: Yes, Sir.
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
> "[A]: I think so.
> "[Q]: You think it would.
> "[A]: I think it would.
> "[Q]: Your honor, I would move for cause at this point.
> THE COURT: All right. Step down." Tr. 266-67.

469 U.S. at 415-16.

pretrial publicity surrounding his retrial. Swindler further contends that he was denied a second change of venue because an Arkansas statute, Ark. Code Ann. § 16-88-207 (1987), which purportedly limits a criminal defendant to one change of venue, was unconstitutionally applied. We disagree.

After Swindler's first conviction was reversed by the Arkansas Supreme Court because the trial court failed to grant a change of venue, Swindler's trial was transferred to Scott County, which is adjacent to Sebastian County. Waldron, the County seat, is about 45 miles south of Fort Smith, the situs of the crime.

Swindler requested a change of venue at the close of each day of voir dire on the ground that the voir dire established that an impartial jury could not be seated. Although the trial judge expressed reservations as to his authority to grant the motion because of the Arkansas venue statute, he did however express a willingness to consider the constitutional implications of the statute if necessary.[4] After the jury had been selected,

---

[4]After the second day of voir dire, Swindler moved for a change of venue. The trial judge denied the motion, stating:

> Also, as you have correctly pointed out, under the Arkansas law a defendant is only entitled to one change of venue, and the court feels that by the news media, and the advances that have been made, and the television, that perhaps there needs to be some changes perhaps made in the law.
>
> * * *
>
> I do want to proceed again tomorrow and see what progress, if any, can be made in the selection of the jury, then if the court is convinced that a jury cannot be obtained here, that jurors here do not have opinions or would be qualified to serve, then the court then would face the legal matter as to whether or not the rights you assert under the United States Constitution

Swindler moved again for a change of venue. The trial court denied the motion, again noting the Arkansas statute, but also denying it on the ground that the jury was impartial. (Tr. 1559-60). Thus, the Arkansas statute aside, the trial court based its denial of a second change of venue on the fact that Swindler had not established prejudice resulting from pretrial publicity.

In Simmons v. Lockhart, we held that although the state court misinterpreted Arkansas law on change of venue, there was not reversible error because the state court also based its ruling on its finding that the jury was impartial. 814 F.2d 504, 507-08; see also Perry v. Lockhart, 871 F.2d 1384, 1390 (8th Cir. 1989). The state court's determination that the jury was not prejudiced by the pretrial publicity and thus impartial is entitled to deference and can be overturned only for "manifest error." Yount, 467 U.S. at 1031 (quoting Irwin v. Dodd, 366 U.S. 717, 723 (1961)). We must give the state court's findings of fact a "presumption of correctness," and may not set them aside unless they are not fairly supported by the record as a whole. 28 U.S.C. § 2254(d)(1)-(8); see Simmons, 814 F.2d at 508. After a careful review of the record, we agree with the District Court that the trial court did not err in denying a second motion for change of venue. 693 F. Supp. at 763-66.

The only evidence regarding pretrial publicity in this case is found in the transcript of the voir dire. The voir dire lasted five days and covers nearly 900 pages of transcript, the larger part of which relates to the extent of the pretrial publicity and the effect it had on the veniremen. One hundred and twenty veniremen were examined and seventy-nine were excused for cause, although not all of those were excused on account of

---

are such that it could be done contrary to the provisions of law.

(Tr. 1074-75).

pretrial publicity.[5] Although the voir dire reflects that there was a great deal of publicity in this case, the record of the voir dire does not reveal "such hostility towards [Swindler] by the jurors who served in his trial as to suggest a partiality that could not be laid aside." Murphy v. Florida, 421 U.S. 794, 800 (1975).

Swindler points to the fact that ninety-eight out of the 120 veniremen had some knowledge of the case. However, the fact that a large number of veniremen have heard of the case is not dispositive. As we said in Simmons: "[T]he fact that a venire panel is well informed on reported news is not by itself prejudicial. The accused is not entitled to an ignorant jury, just a fair one." Simmons, 814 F.2d at 510 (all but one of the fifty-six veniremen had heard of the case); see also United States v. Bliss, 735 F.2d 294, 298 (1984) (virtually all veniremen had some knowledge of the case). The question is whether "the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors" regarding impartiality. Beck v. Washington, 369 U.S. 541, 557 (1962). We agree with the District Court that an examination of the voir dire "do[es] not necessarily evince a wave of public passion against this particular defendant." 693 F. Supp. at 764.

Besides our review of the voir dire, other factors lend support to the trial judge's determination that an impartial jury

---

[5]Of the veniremen excused for cause, four were excused because of their opposition to the death penalty. Others were excused because of an inability to accept philosophically the legal concepts of "presumption of innocence" and "burden of proof." See, e.g., Veniremen #4 May (no pretrial publicity exposure, but could not accept presumption of innocence) (Tr. 725); Venireman #14, Stinson (excused because he would require defendant to offer evidence of innocence) (Tr. 828).

could be impaneled in Scott County. First, Swindler's second trial was conducted over two years after the commission of the crime, and over thirteen months after the first trial. The Supreme Court in Yount stated: "[I]t is clear that the passage of time between a first and a second trial can be a highly relevant fact." 467 U.S. at 1035. This is especially so when, as here, most of the publicity surrounding the crime occurred before and during the first trial. See, e.g., Venireman #53, Roderick (heard news accounts about first trial but nothing since) (Tr. 1104); Venireman #57, Rhyne (only knowledge came from media accounts of the murder at the time it occurred) (Tr. 1127).

In Simmons, in upholding a trial court's refusal to grant a change of venue, we indicated that the lapse of seven months was a relevant factor minimizing the effect of pretrial publicity. "Seven months is not long enough to allow complete forgetfulness of such a major event as this, but it may be long enough to allow the initial heat and hostility to dissipate, particularly when the local press had not kept the story in the forefront of public attention." 814 F.2d at 510; see also, Perry, 871 F.2d at 1390 (the fact that ten months had elapsed between the crime and the trial was a factor minimizing the effect of pretrial publicity).

A second factor minimizing the effect of pretrial publicity is that Swindler was tried over forty-five miles from the situs of the murder. In Simmons and Perry, we upheld trial court decisions not to move trials involving highly publicized murders from a county only five miles from the situs of the murders. Simmons, 814 F.2d at 506; Perry, 871 F.2d at 1389.

These factors combined with our review of the voir dire lead us to conclude that the trial court did not commit manifest error in denying Swindler's change of venue motion. To the contrary, we are satisfied that the painstakingly thorough voir dire assured that a fair and impartial jury was impaneled.

III.

Swindler's next argument for reversal concerns the failure of the trial court to excuse for cause three impaneled jurors who, he contends, exhibited fixed opinions as to his guilt.

In Yount, the Supreme Court held that the question of whether a particular juror "could set aside any opinion he held and decide the case on the evidence" is a question of "historical fact" to be determined by the state trial court. 467 U.S. at 1036. Therefore, a habeas court must afford this determination the presumption of correctness due a state court's factual findings under 28 U.S.C. § 2254(d). Id. at 1036-38; Simmons, 814 F.2d at 512. The question, then, for this court is "whether there is fair support in the record for the state courts' conclusion that the jurors here would be impartial." Yount, 467 U.S. at 1038.

Swindler challenges the seating of jurors Sunderman, Staggs, and Jones.[6] The District Court reviewed the record and determined that the trial court's decision not to excuse these jurors was fairly supported by the record. 693 F. Supp. at 766. Our own independent examination of the voir dire reveals ample support for the trial court's findings of impartiality.

During the voir dire, juror Sunderman stated that he had heard and read about the shooting and Swindler's first trial. Although he stated that he had formed an opinion as to Swindler's guilt after the first trial, he also made it clear that he could

---

[6]Swindler challenged each of these jurors after extensive voir dire. After the trial court refused to remove the jurors for cause, Swindler did not strike any of them with an available peremptory and announced them "good" for the defense.

lay aside this opinion and impartially decide the case. See Tr. 972 (presently doesn't have an opinion as to how the case should be decided); Tr. 973 ("I would make my decision based upon the facts."); Tr. 978-9 ("I did not hear all of the evidence [at the first trial] and based on what I did hear at that particular time I had an opinion at that time; at this time I would base my opinion on the evidence that was presented."); Tr. 979-80 ("Well, as I said before, I had my opinion at that time, and I feel like if I sit on any jury it would be my duty to make my decision at that time based on the facts that were presented to me, not what had been presented somewhere else."); Tr. 982 ("If I were sitting on the jury I would weigh the evidence that was presented to me in the courtroom, and not what had been carried on TV or in the newspaper.").

Juror Staggs also stated that he had heard about the shooting and first trial. (Tr. 1231-32). Although the questioning at voir dire produced several ambiguous responses requiring, at times, the court's interjection for clarification (Tr. 1222, 1228-30), the record as a whole clearly supports the trial court's determination that Staggs was impartial.[7]

---

[7]Illustrative of Staggs's ability to lay aside any opinion he might have had is this exchange with defense counsel after Staggs indicated he had formed an opinion as to Swindler's guilt after the first trial:

> Q. Do you have that opinion at this time?
> A. Yes, I guess you would say, to an extent. Not that I couldn't change it if it was different, but I still believe, you know, you would have to have some confidence in the people.
> Q. Is that a fixed opinion, you feel you would have difficulty getting rid of that opinion?
> A. No, I can accept facts.
> * * *
> Q. I am asking you, would you require something from the defendant's side of the case before you would change the opinion that you have?
> A. No. If I was on the jury I could listen, you know, to the trial; and if there was a difference, I wouldn't pay any attention to my opinion because if I listen to that I will listen to the facts that are brought out.
> * * *
> Q. You would not compare the State's evidence, or whatever the evidence might be with what had been reported?
> A. I would only want to hear what went on at the present.
> Q. Now, if you felt that the opinion was making it difficult for you while you were deliberating on the case, after the case was presented to you, and you felt you were having difficulties getting rid of your opinion, or your opinion was conflicting with what the evidence had been, do you feel you could report that to the Court, the Judge?
> A. I wouldn't serve on it if I couldn't drop my opinion; I wouldn't go with a thought either way.

(Tr. 1235-37).

The voir dire of juror Jones was the most extensive. (Tr. 1146-65). His responses made it clear that he did not want to serve on the jury. (Tr. 1150, 1161). Jones, who exhibited more knowledge about the case than any other juror, stated that he had formed an opinion as to Swindler's guilt after the first conviction. Although Jones's initial responses were at times contradictory, extensive questioning by defense counsel clarified his position. (Tr. 1147, 1155-56). After numerous questions concerning his tentative opinion, Jones stated: "[I]f I was put on that jury I would listen to what was said, and base my opinion on that, period." (Tr. 1158). And, again, he reiterated his impartiality, stating: "I am trying to make it clear to you, which I think is unnecessary, that I would take the evidence and the law in the case and base my opinion on that." (Tr. 1158).

It was for the trial judge to assess Jones's demeanor and attitude. See Yount, 467 U.S. at 1038-1040. Granting the appropriate deference to the trial court's determination of

impartiality, we agree with the District Court that the trial court's decision not to excuse Jones for cause is fairly supported by the record.

IV.

Swindler next contends that he was denied a fair trial when the trial court refused to grant a continuance at the penalty phase of his trial to enable him to offer the testimony of an expert regarding the effects of electrocution on the human body. Swindler intended this evidence to show that death by electrocution is cruel and unusual punishment and for the jury to consider this evidence as a mitigating factor. We find no merit in this claim.

A trial court enjoys broad discretion in ruling on a motion for a continuance. See, e.g., Morris v. Slappy, 461 U.S. 1, 11 (1983); Loggins v. Frey, 786 F.2d 364, 366-67 (8th Cir. 1986), cert. denied, 479 U.S. 842 (1986). "[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" rises to the level of a constitutional violation. Morris, 461 U.S. at 11-12 (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

Here, the trial court's refusal to grant the continuance was clearly not unreasonable because Swindler did not have a justifiable reason for the requested delay. As the trial court ruled, the testimony for which Swindler wanted the delay was irrelevant as mitigating evidence; whether death by electrocution constitutes cruel and unusual punishment is a question of law, and is not within the province of the jury to decide. It follows that the trial court did not abuse its discretion in denying Swindler's request for a continuance.

V.

Swindler next argues that the trial court committed constitutional error by instructing the jury that it could consider as an aggravating circumstance whether the defendant had knowingly created a great risk of death to a person other than the victim. See Ark. Code Ann. § 5-4-604(4) (1987). Swindler objected to this instruction on the ground that there was not any evidence to support the giving of the instruction. This claim is meritless.

Under Arkansas law, a trial court must submit to the jury a mitigating or aggravating circumstance if there is any evidence, however slight, of the circumstance. Miller v. State, 269 Ark. 341, 354, 605 S.W.2d 430, 438 (1980). The record contains substantial evidence that Swindler knowingly created a great risk of death to a person other than the victim. As the Supreme Court of Arkansas found:

> [S]hots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. . . . There was ample evidence Swindler had no regard for the lives of others in the vicinity.

Swindler, 267 Ark. at 434, 592 S.W.2d at 99.

We conclude that the trial court's submission of the challenged instruction is sufficiently supported by the record.

VI.

Finally, Swindler contends that he was denied effective assistance of counsel at trial. This claim must be evaluated against the two-prong test announced in Strickland v. Washington, 466 U.S. 668 (1984). First, Swindler must show that "counsel's representation fell below an objective standard of reasonableness," id. at 688, creating "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Second, Swindler must show that the deficient performance prejudiced the defense. Id. In Strickland, the Court explained: "Judicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Id. at 689. Swindler's claims of ineffective assistance of counsel are analyzed separately below.

A.

Swindler argues that his counsel[8] rendered ineffective assistance because they failed to follow statutory procedures when moving for a change of venue. Arkansas requires that a motion for a change of venue be accompanied by affidavits or sworn testimony. See Ark. Code Ann. § 16-88-204 (1987). Swindler's trial counsel waited until the voir dire to move for a

---

[8]Swindler was represented at his second trial by Don Langston, now a state circuit-chancery judge in Sebastian and Crawford Counties. Judge Langston also represented Swindler at his first trial and won the reversal of that conviction in the Arkansas Supreme Court. Langston had been an attorney for over seventeen years (seven with the public defender's office) at the time of the second trial. Langston was assisted in his representation of Swindler by John W. Settle, now a municipal judge in Fort Smith, Arkansas.

change of venue. None of the six motions for change of venue was supported by affidavits.

Swindler's trial counsel explained at the habeas hearing that the reason he did not file a pretrial change of venue motion accompanied by affidavits was because he felt he could better show that pretrial publicity had prejudiced Swindler's right to a fair trial through the responses of the veniremen at voir dire.[9] (H.Tr. 11-13, 21-22). As observed earlier in this opinion, a great deal of the voir dire concerned the venire panel's exposure to pretrial publicity and whether the publicity had prejudiced them. Further, counsel moved at the close of each day of voir dire for a change of venue on the ground that the questioning of the prospective jurors had established that Swindler could not receive a fair trial. A number of exhibits were offered in support of the final motion.[10] (Tr. 1527-55) Even though the motions were not supported by affidavits, the trial judge considered each motion on the merits. We agree with the District Court that the failure of counsel to follow statutory procedures in moving for a change of venue was not sufficiently serious to amount to a constitutionally deficient performance. 693 F. Supp. at 768. Moreover, it is apparent that Swindler suffered no prejudice from the failure of counsel to follow the letter of the statute.

---

[9]Counsel testified at the habeas hearing that his approach in the case was:

> that you could show through voir dire that there was pretrial--that there was prejudice against Mr. Swindler; therefore, you would go on the United States Constitution of due process, denial of a fair trial and things of that nature.

(H.Tr. 21).

[10]These exhibits included information concerning the population of Scott County, the number of registered voters, and a jury list with notations indicating reasons for exclusion. (Tr. 1527-55).

B.

Swindler claims that his counsel rendered ineffective assistance in failing to investigate and offer mitigating evidence regarding his mental problems at the penalty phase of the trial.

Counsel testified at the habeas hearing that he had read a report prepared before the first trial on Swindler's mental condition.[11] (H.Tr. 14). The report consisted of historical data from outside sources; a medical history; reports on the physical, psychiatric, and neurological examinations conducted; a psychological assessment by the staff psychologist; and a psychiatric history. (Tr. 14). Counsel testified: "I think that my basis [for not introducing the report] was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful." (H.Tr. 15). When asked the contents of the report, counsel testified: "Well, it was of course, unfavorable to [Swindler], but--well, we--what we were afraid to do was offer part of it because then the prosecutor, I'm sure, would want to offer all of it, and there was some damaging comments either from Mr. Swindler or something else in those reports that we felt would not be helpful to us." (H.Tr. 74). Counsel did not consider the report to be mitigating evidence. (H.Tr. 74).

As the Court stated in Strickland, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

---

[11]Swindler was ordered to undergo examinations at the Arkansas State Hospital in Little Rock prior to his first trial in order to determine his mental condition. Swindler spent thirty-six days at the state hospital. (Tr. 8-9).

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Swindler makes conclusory allegations that counsel should have introduced the report and other evidence of his mental problems. There is nothing, however, in the record of the habeas hearing, other than Swindler's testimony, to show that Swindler in fact suffered from any mental problems. Cf. Burger v. Kemp, 483 U.S. 776 (1987) (petitioner presented affidavits at the habeas hearing that described the evidence that defense counsel might have presented); Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987) (petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect).

On the other hand, counsel testified that he obtained the state hospital report and determined that it would be more harmful than helpful to Swindler's penalty phase defense. (H.Tr. 15). Swindler has made no showing that the decision of counsel to forego use of the report was inadequate or unreasonable. Therefore, given the strong presumption of competence afforded trial counsel's performance, we cannot find that the tactical decision not to introduce the medical report constituted deficient assistance of counsel. See Hayes v. Lockhart, 852 F.2d 339, 351-52 (8th Cir. 1988), cert. granted, vacated on other grounds, 109 S. Ct. 3181 (1989) (held that counsel's strategic decision not to introduce psychological evidence about defendant because the risk of probable harm exceeded the possible benefit was reasonable). As we stated in Laws v. Armontrout, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 109 S. Ct. 3179 (1989):

> If counsel has through neglect failed to discover [mitigating] evidence, then counsel will be found ineffective. If, however, counsel did not produce the mitigating evidence because, after a reasonable investigation and exercise of professional judgment, he

> has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.

Id. at 1385. From the evidence presented, we conclude that the investigation by counsel of Swindler's mental problems was reasonable and that the decision not to introduce the state hospital report has not been shown to be constitutionally deficient.

C.

Finally, Swindler argues that counsel erred in failing to request the trial court to admonish the jury not to discuss or read about the case. A review of the record, however, shows that the trial court admonished the potential jurors on the first day of their voir dire as follows:

> All right, now to you jurors whose names were not read, you will be excused until 9:30 tomorrow morning. And again, it is important that you do know that you cannot remain in the courtroom during examination of individual jurors. I would say this to you, also. None of you have been selected on the jury, but all of you are on the jury panel. So certainly do not permit anyone, under [any] possible circumstances, to discuss this case in your presence. Certainly you should not discuss it with any other member of the jury panel.

(Tr. 684-85). Although a further admonition of the jury may have been desirable, we agree with the District Court that the failure to request an additional admonition does not rise to the level of constitutionally ineffective assistance of counsel. 693 F. Supp. at 669-770.

VII.

Swindler has not shown any constitutional flaw in his conviction or sentence. The judgment of the District Court denying Swindler's petition for a writ of habeas corpus is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

12

FILED

NOV 06 1989

ROBERT D. ST. VRAIN
CLERK

No. 88-2387EA

John Edward Swindler,

Appellant,

vs.

A.L. Lockhart, Commissioner of the Arkansas Department of Correction,

Appellee.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

November 6, 1989

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

AUG 12 1988

CARL R. BRENTS, CLERK
By: DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JOHN EDWARD SWINDLER — PLAINTIFF

V. — NO. PB-C-81-415

A. L. LOCKHART, Director,
Arkansas Department of Correction — RESPONDENT

MEMORANDUM OPINION

Petitioner John Edward Swindler was convicted of the capital felony murder of Randy Basnett, a Ft. Smith police officer, and was sentenced to death by the Circuit Court of Sebastian County, Arkansas. The Supreme Court of Arkansas set aside that conviction and granted Swindler a new trial because the trial court had erroneously refused to grant the defense motion for a change of venue from Sebastian County, the situs of Officer Basnett's killing. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978).

Swindler was retried in Scott County, Arkansas, which adjoins Sebastian County to the South. The Circuit Court of Scott County found Swindler guilty of capital felony murder and sentenced him to death. This second conviction and death sentence have been appealed and affirmed by the Supreme Court of Arkansas, 287 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, Swindler v. Arkansas, 449 U.S. 1057 (1980). Subsequently, Swindler filed for post-conviction relief pursuant to Rule 37 of

the Arkansas Rules of Criminal Procedure. The petition was denied by the Supreme Court of Arkansas, Swindler v. State, 272 Ark. 340, 617 S.W.2d 1 (1981), cert. denied, 454 U.S. 933 (1981). Thus, post-conviction remedies available through the courts of the State of Arkansas have been exhausted.

Petitioner seeks relief from the Scott County conviction and death sentence and has filed for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2242 and 2254. He asserts six (6) grounds for relief[1]: (1) a venireman was excluded after he voiced only general objections to the death penalty; (2) Ark.Stat.Ann. § 43-1507[2] was unconstitutionally applied to him when he was denied a second change of venue; (3) jurors biased against the petitioner were selected after the defense had exhausted its peremptory challenges; (4) the trial court erred in refusing to grant a continuance in the penalty phase of his bifurcated trial so that the defense could present a witness to testify in his behalf; (5) Ark. Stat.Ann. § 41-1303(4)[3] was unconstitutionally applied to petitioner when an impermissible "aggravating circumstance" was considered by the jury in the penalty phase of

---

[1]Petitioner originally asserted nine (9) grounds for relief, but proceeded with only seven at the habeas hearing. He now concedes that the claim that the "death qualifying" of the jury violated his sixth amendment right must fail in light of Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986).

[2]The Arkansas venue statute is now found at Ark. Code Ann. § 16-88-207.

[3]The statute is currently found at Ark. Code Ann. § 5-4-604(4).

his trial; and (6) petitioner was denied effective assistance of counsel at trial.

I.

Four veniremen were excused after voicing objection to the death penalty. The petitioner challenges the exclusion of one of the four, Murl Carmak, on grounds that Carmack expressed only general objections to the death penalty.

Exclusion of a juror on the basis of objection to the death penalty is appropriate when that juror's views "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

The trial court excused Mr. Carmack after a series of questions posed to Mr. Carmack by counsel and the court revealed opposition to the death penalty. Several of those questions indicate that Mr. Carmack was properly excused for cause:

> Q. I understand you might not want to [impose the death penalty], but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?
>
> A. Well, now I would stick to what I believe in.
>
> Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?
>
> A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way.

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

. . . .

THE COURT: Now what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't.

THE COURT: In any case?

A. I don't believe I would.

(Tr. 1447-48).

This court is obligated to presume the correctness of the trial court's findings of fact. 28 U.S.C. § 2254(d). The United States Supreme Court has held that the trial court's decision to excuse prospective jurors due to their opposition to the death penalty is primarily a factual determination, thus subject to a presumption of correctness under § 2254(d). Wainwright v. Witt, supra. The trial court is best suited to judge the issue of bias since "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428.

In this case the trial court's findings must be sustained. Venireman Carmack plainly said that under no circumstances would

he vote to impose the death penalty. Mr. Carmack was properly excused.

II.

The petitioner next argues that his sixth amendment right to be tried by an impartial jury was abridged when the trial court denied a motion for a change of venue. After Swindler's first conviction, the Supreme Court of Arkansas reversed and granted a new trial because the trial judge had refused to grant the defense motion for a change of venue from Sebastian County, where Swindler had shot and killed a Ft. Smith police officer. Swindler, supra. On remand, the trial was conducted in Scott County, which is adjacent to Sebastian County.

Swindler contends that he was entitled to a change of venue in the second trial because prejudicial pre-trial publicity in Scott County was indistinguishable from that in Sebastian County. Swindler further contends that he was denied a change of venue from Scott County because of an unconstitutional Arkansas statute[4] which purports to limit a criminal defendant to one change of venue. The argument is without merit and is unsupported by the record.

The question of whether to grant a change of venue rests squarely in the discretion of the trial court. Johnson v. Nix,

---

[4]Ark. Code Ann. § 16-88-207.

763 F.2d 344 (8th Cir. 1985). The trial judge had the opportunity to evaluate the tenor of the voir dire and to observe and assess each prospective juror's demeanor in conjunction with his or her answers to questions. Thus, the trial judge was uniquely qualified to determine whether a change of venue was required in order to assure that the defendant received a fair trial. It is settled law that the trial court's findings of impartiality can be overturned only for "manifest error." Patton v. Yount, 467 U.S. 1025 (1984), quoting Irvin v. Dowd, 366 U.S. at 723. In other words, this court must accord the state court findings of fact a "high measure of deference," Sumner v. Mata, 455 U.S. 591 (1982), and may not set them aside unless it is reasonable to conclude that those findings "lacked even 'fair support' in the record." Johnson, 763 F.2d 344 at 345, quoting Marshall v. Lonberger, 459 U.S. 422 (1983).

The question of prejudicial pre-trial publicity requires a two-prong inquiry: First, what was the nature and extent of the pre-trial publicity; and second, what was the effect of the pre-trial publicity on the venire panel from which the jury was selected, and on the jury itself. See Simmons v. Lockhart, 814 F.2d 504 (8th Cir. 1987). Widespread or even adverse publicity is not, in and of itself, grounds for a venue change. Johnson, supra. This court must determine from the totality of the circumstances, whether the trial court committed manifest error in failing to hold that adverse pre-trial publicity had created such a presumption of prejudice in the community that jurors'

claims that they can be impartial should be disbelieved. Yount, supra.

The only evidence of the extent of pre-trial publicity in this case is the transcript of the voir dire of the prospective jurors. In a voir dire that lasted five days, 120 veniremen were examined; 79 were excused for cause.

It is clearly established law that the number of jurors excused for cause, standing alone, does not entitle a defendant to a change of venue. See Yount, supra. There is no "magic number" excused for cause that triggers the presumption that there exists within the community a "pattern of deep and bitter prejudice" against the defendant so evident that the entire panel must be presumed to have been "irretrievably poisoned by the publicity." Simmons, supra, 814 F.2d at 511, quoting Irvin v. Dowd, 366 U.S. 717 (1961).[5] The Supreme Court carefully distinguished between knowledge of and feelings about the case: "It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed." Yount, 467 U.S. at 1035.

Of the 79 veniremen excused for cause in the pending case,

---

[5]However, it is instructive to note that in Yount, 163 veniremen were questioned, all but two of whom had some knowledge of the case. Seventy-seven percent of those questioned admitted they would carry an opinion into the jury box. Eight of the fourteen actually seated as jurors or alternates admitted that at some time they had formed an opinion as to the defendant's guilt.

many were excused because of an inability to accept philisophically the legal concepts of "presumption of innocence" and "burden of proof." See, e.g. the statements of the following: Venireman #4, May (no evidence of exposure to pre-trial publicity, but did not answer that defendant, prior to trial, is innocent) (TR 725); Veniremen #14, Stinson, and #1, Owen, (had no fixed opinion as to guilt but excused because they would require defendant to offer evidence) (TR 825, 723).

Others felt their opinions of guilt were fixed since they had knowledge that the first trial had resulted in a conviction. See, e.g., statements of the following veniremen: Venireman #9, Campbell (cannot presume defendant innocent because he has "already been tried") (TR 750); Venireman #12, Nelson (knew very little of background of the case, but excused because he would require defendant to produce some evidence since he had already been convicted in one fair trial) (TR. 769); Venireman #13, Neal (very little exposure to pre-trial publicity, but excused because he cannot "conceivably think that twelve people would convict him unless he was guilty") (TR 809-10). Still others felt that since Swindler had been convicted once, that conviction should stand and he should not be entitled to a second trial. See, e.g., the following statements. Venireman #34, Snellgrove (excused because of belief that Swindler's first trial was fair) (TR 988); Venireman #45, Nichols (excused because defendant had "already been proved guilty" and should not have another trial) (TR 1055). While these legal misunderstandings

may require excusal for cause, they do not necessarily evince a wave of public passion against this particular defendant.

In this case, the trial court advised counsel that all doubts or questions about the impartiality of any prospective juror would be resolved by excusing that person. (T. 1559). A review of the voir dire indicates that the trial court did exactly that. The trial judge is to be commended for his cautious approach, particularly when, as in this case, the defendant faces the possibility of a death sentence.

It is reasonable to expect the number of prospective jurors excused for cause to be high in a sensational case such as this. There was unquestionably a great deal of publicity. Furthermore, there is an understandable reluctance on the part of many to serve on a jury where the imposition of the death penalty lurks as a possibility, as evidenced by the voir dire of Cora Owens:

> Q. No one then has ever expressed any opinion about what they felt about the case?
>
> A. Well, except for my ex last night, he just said that he was trying to tell me how to get off [the jury] if I wanted off.

(T. 1422).

A review of the voir dire of prospective jurors does reveal that a large number of those questioned had at least some knowledge of the case. But clearly, mere knowledge or remembrance of the facts surrounding the case is not the same as a deep and bitter prejudice fueled by "so huge a wave of public passion" against the defendant that even those who profess to hold no opinion must be deemed tainted. Irvin, supra. The

United States Supreme Court has held that there is no requirement that jurors be totally ignorant of the facts and issues involved.

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

Irvin, 366 U.S. at 722-23.

Two other factors lend support to the trial court's finding that an impartial jury could be empaneled in Scott County. First, by the time the second trial convened, over two years had elapsed since Officer Bassett's killing. In the case of Simmons v. Lockhart, the defendant's trial began only seven months after the murders of three victims. The Court of Appeals for the Eighth Circuit affirmed the trial court's refusal to move the trial from the county in which the victims were abducted and noted: "Seven months is not long enough to allow complete forgetfulness of such a major event as this, but it may be long enough to allow the initial heat and hostility to dissipate, particularly when the local press had not kept the story in the forefront of public attention." Simmons, 814 F.2d at 510. The two-year interim in Swindler's case suggests that the nature and extent of the publicity must surely have diminished along with the heat and hostility. In fact the voir dire suggests that exposure of many veniremen to publicity surrounding the case occurred immediately after the shooting occurred, or around the time of first trial. See, e.g., statements of the following: Venireman #53, Roderick (heard news accounts about his first

trial.") (TR 1104); Venireman #57, Ryne (only knowledge came from newspaper accounts "at the time") (TR 1137); Venireman #71, Williams ("Well I did read the newspaper during the other trial.") (TR 1201).

Second, the fact of the matter is that the defendant was not tried in the community, or county where the crime were committed. As juror Owens noted in voir dire: "I have heard a little bit about the case, but I didn't pay too much attention to it because it wasn't right here in town [Waldron, Scott County]." (T. 1421). Cases such as Patton v. Yount, supra, and Simmons v. Lockhart, supra, by which this court is bound, have upheld the trial court's refusal to move the trial from the situs of the crime. This court finds no manifest error in the trial court's determination that the defendant could receive a fair trial in this changed venue in a different county and different judicial district.

The Arkansas statute in question, which purports to limit a criminal defendant to one change of venue, is not unconstitutional on its face. As with Article 2, § 10 of the Constitution of Arkansas,[6] the statute can, and must, be read as operative only within the bounds of the sixth and fourteenth amendments to the United States Constitution.

In this case, the trial court apparently had some

---

[6]The constitutional provisions limit venue in criminal cases to a county in the judicial district in which the indictment was brought.

misapprehension about its power to grant a second change of venue. However, even if the trial judge erroneously believed that Ark. Code Ann. § 16-88-207 prevented absolutely a second change of venue, the court expressed a willingness to consider the constitutional implications of the statute if necessary to preserve the defendant's right to a fair trial." (TR 879).

As in the case of Simmons, supra, the trial court gave alternative reasoning for denying the change of venue and did not base his decision solely on the belief that he lacked the authority to grant the change. Even if there were error, there was no actual prejudice since the seated jury was composed of those who either had virtually no knowledge of the case, or who had tentative opinions which could be set aside.

Accordingly, this court having found no manifest error in the decision of the trial court not to permit a change of venue from Scott County, this ground for relief is DENIED.

III.

For his next point the petitioner alleges that three jurors were seated who should have been excused for cause. The strong presumption of correctness of the trial court's findings, discussed infra, is equally applicable to findings of impartiality of individual jurors:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions [of impartiality of jurors]. First, the determination has been made only

> after an often extended voir dire proceeding designed specifically to identify biased veniremen. . . . Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." E.g., Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984). The respect paid such findings in a habeas proceeding certainly should be no less.

Yount, 467 U.S. at 1038.

Neither the fact that the three jurors in question had knowledge of the case, nor the fact that they held tentative opinions as to the defendant's guilt rendered them ineligible to serve, so long as they could set aside any opinion they might have had and so long as they could assure the court that their verdict would be based solely on the evidence presented at trial.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 722-23. The court has reviewed the voir dire of each of the three jurors and finds no manifest error in the trial court's finding that each could set aside any preconceived notions.

Accordingly, this ground for relief is DENIED.

IV.

The petitioner next alleges that he was denied a fair trial

at the penalty phase of his trial when the trial court denied a request for a one-day continuance so that he could offer the testimony of Mr. Don Reid. Mr. Reid would have testified that death by electrocution constitutes cruel and unusual punishment. The testimony would have centered on the effects of electrocution on the human body. Petitioner urges that he was entitled to present this testimony as mitigating evidence, so the jury could decide whether electrocution was an appropriate punishment for his crime.

The trial court refused to grant the continuance because it considered testimony about the effects of electrocution on the human body to be inadmissible as mitigating evidence. The judge opined that a determination as to whether electrocution constituted cruel and unusual punishment was a question of law, not of fact, thus was outside the province of the jury.

The petitioner's argument has now been mooted by the fact that the General Assembly of the State of Arkansas has changed the method of execution from electrocution to lethal injection.[7] The change would permit the petitioner now to elect either of these methods by which to die. Even if there were error in the exclusion of the testimony, the petitioner has suffered no actual harm in the jury's not being apprised of the pain and suffering incurred during an electrocution. The petitioner need not choose that method of execution.

---

[7]Ark. Code Ann. § 5-4-617.

Regardless, the trial court's ruling on the matter was not erroneous. The defendant in a death case is granted wide latitude in presenting mitigating evidence in the penalty phase of the trial. But even Yankee stadium has a fence around it. The trial court is not precluded from excluding "evidence" which is irrelevant to the defendant's character, prior record, or the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586 (1978).

The jury has no duty to determine the method of execution, any more than it has a duty to determine the specific penitentiary in which a defendant should be incarcerated. The pain associated with electrocution is no more relevant to the penalty phase of a murder trial than would be the horror stories of atrocities that go on within our penitentiaries. The petitioner was not entitled to have the testimony presented. The denial of the motion for continuance was proper since the testimony to be offered was correctly deemed inadmissible.

Accordingly, this ground for relief is DENIED.

V.

The petitioner alleges that Ark. Code Ann. § 5-4-604, which governs what constitutes an "aggravating circumstance" for purposes of supporting the imposition of the death penalty, was unconstitutionally applied to him. At the penalty phase of the trial, the court instructed the jury that it could consider as an

aggravating circumstance whether the defendant had knowingly created a great risk of death to a person other than the victim. The trial court gave the instruction over the defense objection that there was insufficient evidence in the record to support the giving of the instruction. This ground is patently meritless.

The facts recited by the Supreme Court of Arkansas indicate ample evidence that the petitioner knowingly created a great risk of death to a person other than the victim:

> The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. . . . There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, and all those loaded guns, and even Swindler's own testimony."

267 Ark. at 434, 599 S.W.2d at 99.

These findings are entitled to a presumption of correctness, just as are those of the trial court. Sumner v. Mata, supra. Swindler's own testimony in the case confirms that he went into the store to ask for directions, saw Tinder and Officer Basnett talking, and went back outside. (T. 2006). Swindler even mentions that, once outside, he saw a couple of children on bicycles. (T. 2008). Clearly, there was ample evidence in the

record to support giving the instruction.

Accordingly, this ground for relief is DENIED.

VI.

Petitioner next asserts that he was denied the effective assistance of counsel at trial. In the case of Strickland v. Washington, 466 U.S. 668 (1984), the Court established two requirements for finding ineffective assistnce of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687.

The court further explained:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . . There are countless ways to provide effective assistance in any

deficient. However, in this case, the trial judge considered each motion on the merits, ignoring the absence of supporting documentation. It is unnecessary for this court to speculate why the affidavits were not offered simultaneously with the motions, or why the trial court considered the motions as properly submitted and ripe for decision. The record shows that a number of exhibits not explicitly required by statute were offered in support of the last motion. (TR 1527). In any event, the motions were all decided on the merits, as if they had been properly submitted. Thus this court does not find that the counsel's failure was an error so serious as to amount to constitutionally deficient performance.

Even if counsel's failure to file the documents were deemed deficient, petitioner's claim could not succeed, since there is no showing thata he was prejudiced. Having held that it was not error to deny the second change of venue, the court can find no prejudice in counsel's failure to file supporting documents with the motion for change of venue.

B.

Petitioner also alleges that his counsel rendered constitutionally ineffective representation by failing to investigate and offer mitigating evidence regarding his mental problems at the penalty phase of the trial.

The petitioner's trial counsel testified at the habeas

hearing that the petitioner was sent for a mental examination before his first trial. H.T. 14. Counsel testified that he had investigated the defendant's mental condition by way of securing records from the state hospital, where the mental evaluation was performed. Counsel testified as follows:

> Q. Do you recall ever have [sic] conversations with the psychiatrist or psychologist [at the state hospital] who examined John Swindler?
>
> A. I don't have any independent recollection of it now.
>
> Q. In any event, none of those officials or persons were called in support of any mitigating circumstances, were they, in either the first or the second trial?
>
> A. I think that my basis on that was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful.

H.T. 15. Counsel further testified:

> A. We never -- I don't think we even though about introducing the State Hospital stuff at the second trial. The decision, I think, was made at the first trial not to introduce that, and we never changed that decision.
>
> Q. Do you recall what the gist of the State Hospital -- the result of their evaluation was?
>
> A. Well, it was, of course, unfavorable to him, but -- well, we -- what we were afraid to do was offer part of it because then the prosecutor, I'm sure, would want to offer all of it, and there was some damaging comments either from Mr. Swindler or something else in those reports that we felt would not be helpful to us.
>
> Q. So it's fair to say then you didn't think that that would be mitigating evidence?
>
> A. That's correct.

H.T. 74.

There is absolutely nothing in the record of the habeas hearing to establish that the petitioner indeed suffered any

mental disturbance which could have been introduced at his trial, except the petitioner's testimony. Cf. Wilson v. Butler, 813 F.2d 664 (5th Cir.1987) (petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect). There was evidence that the reports from the State Hospital would have contained information about personality defects, had they been present, as well as a complete background of the patient's mental history.

In sum, from the evidence presented, the court cannot conclude that trial counsel's investigation was inadequate or unreasonable. The decision not to introduce psychciatric records was a strategic decision based on the fact that it contained more damaging than helpful information. Given the strong presumption of competence, this court cannot find that counsel's performance was constitutionally deficient.

C.

Petitioner's last allegation regarding ineffective assistance of counsel is that trial counsel failed to request an admonition to the panel of veniremen not to discuss or read about the case. The trial transcript indicates that the trial court did indeed admonish the veniremen: "All right, now to you jurors whose names were not read, you will be excused until 9:30 tomorrow morning. And again, it is important that you do know that you cannot remain in the courtroom during examination of the

individual jurors. I would say this to you, also. None of you have been selected on the jury, but all of you are on the jury panel. So certainly do not permit anyone, under [any] possible circumstances, to discuss this case in your presence. Certainly you should not discuss it with any other member of the jury panel." (TR 684-85). Counsel's failure to request different or further admonition does not rise to the level of constitutional ineffective assistance of counsel.

Petitioner further contends that his trial counsel erred in failing to object to the admission of a record of an armed robbery during the penalty phase of the trial which did not indicate that he was represented by counsel. The court has reviewed the record of that conviction even though the issue is arguably not properly before the court due to procedural default. The record which was introduced rather clearly indicates that the State of South Carolina was represented by John W. Foard, Jr. (TR. 2187-88). The allegation is soundly rebutted by the record of the trial.

In light of the record, this court cannot conclude that the representation the petitioner received was outside the range of reasonable professional assistance. This ground for relief is DENIED.

CONCLUSION

It is the considered opinion and judgment of this court that the petitioner, John Edward Swindler, was afforded a fair and constitutional trial before the Circuit Court of Scott County, Arkansas. Accordingly, the petition for writ of habeas corpus is hereby denied.

This 12 day of August, 1988.

HENRY WOODS, U. S. District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2387EA

John Edward Swindler,	*	
	*	
Appellant,	*	Appeal from the United States District Court for the Eastern District of Arkansas
	*	
v.	*	
	*	
A. L. Lockhart, etc.,	*	
	*	
Appellee.	*	

Appellant's motion to recall the mandate and reinstate stay pending filing of a petition for writ of certiorari in the United States Supreme Court is granted to and including January 26, 1990. The Clerk of the United States District Court for the Eastern District of Arkansas is directed to return the previously issued mandate to this Court. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 19, 1989

Order Entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER, PETITIONER	)	
VS.	)	No _____
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT	)	

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX II
Opinion of Arkansas Supreme Court
Swindler v. State, 272 Ark. 340, 617 SW2nd 1

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

18pp

IN BANC

SUPREME COURT OF ARKANSAS

No. CR 79-116

Opinion Delivered DEC 17 197[illegible]

JOHN EDWARD SWINDLER,
Appellant,

V.

STATE OF ARKANSAS,
Appellee.

An Appeal from Scott County Circuit Court; David Partain, Judge.

Affirmed.

DARRELL HICKMAN, *Associate Justice*

John Edward Swindler's first trial for killing Randy Basnett, a Fort Smith police officer acting in the line of duty, was held in February, 1977. He was found guilty of capital murder and sentenced to die by electrocution. His trial was held in Fort Smith, Sebastian County. We reversed that conviction because the court failed to grant a change of venue and because the court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978). The case was tried again but this time in Scott County, an adjacent county to the the judicial district. Swindler was convicted the second time of capital murder and received the same sentence. This is an appeal from that conviction.

The shooting occurred when Swindler stopped off at Fort Smith, Arkansas apparently enroute to Kansas City from South Carolina. He pulled into the Road Runner Service Station just off Interstate 540, which bypasses downtown Fort Smith. It was about 5:00 p.m., Friday afternoon, September 2, 1976.

Basnett, a Fort Smith policeman who was on duty, had stopped to drink a coke with Carl Tinder at the Road Runner Service Station. Tinder ran the service station, which included a small convenience store. Basnett had in the past dropped by from time to time to drink coffee or a coke with Tinder. As they were talking at the counter, inside the station-store, Swindler drove up and parked his vehicle in the middle lane of three lanes under the station canopy. His vehicle was headed east, the driver's side facing the front of the station-store. Swindler went in and asked for directions to Kansas City. Basnett and Tinder told him how to proceed.

Swindler went back outside, raised the hood on his vehicle and was looking after the vehicle when Basnett left the station-store. Basnett got in his police vehicle, which was parked nearby, and drove around to the other side of the station, parking his vehicle to the rear of Swindler's. Apparently Basnett made a radio call and then walked up to Swindler.

Two witnesses testified that Swindler shot and killed Basnett as the officer stood at the car door on the driver's side. Basnett had not pulled his gun until after he was shot. Tinder was one of these eyewitnesses; he was inside the store; the other witness was a man named Steve Cardwell who said he was outside the station.

Basnett was able to fire five or six times through the car door before he died. Basnett fell back, fatally wounded. Swindler, although he was injured, was able to drive off. He was arrested shortly thereafter. The State Police District Headquarters was just across the street from the station.

Four guns and a rifle scope, as well as some ammunition, were found near the vehicle: a .38 Colt revolver, a .38 Smith and Wesson revolver, a 9 shot .22 automatic pistol, all fully loaded, and a .22 caliber rifle containing three live rounds. Over 200 rounds of live ammunition for the rifle were found in or near the vehicle. This evidence was introduced over Swindler's objections.

Swindler's version as to the actual shooting differed. He said he saw the policeman get in his car and thought he was leaving. Swindler went back to seeing after his car and had just gotten into it when he heard a "cock," as a hammer being cocked on a pistol, heard something said to the effect, "damn hippie," and was shot. He said he had a pistol in his belt and another in his pocket and, just as he was laying down the pistol he had taken from his belt, this happened; he turned instinctively and the gun went off. He said he did not know it was a policeman until after he fired. He claimed he was shot first.

He remembered seeing Tinder inside the station-store. He recalled after the shooting
/seeing some children about on bicycles. He did not recall seeing the other eyewitness, Cardwell.

The first trial was preceded by news coverage of the killing, of the funeral of the police officer, and of Swindler's past. The coverage was substantial. In some instances the stories contained material that could and, in fact did, result in prejudice to Swindler's right to a fair trial at that time in Sebastian County. The extent of that coverage was discussed at length in our opinion deciding the first appeal. Chief Justice Carleton Harris, in a concurring opinion,

especially addressed the problem created by the news coverage of the killing and its relation to Swindler's first trial.

Although the appellant in this case argues some of the same issues regarding a prejudiced community and jury, there is no evidence at all in this record of unfavorable pretrial publicity. The record we have regarding those arguments consists solely of the voir dire examination of veniremen (prospective jurors) from Scott County.

We have examined the record not only as to those allegations of error raised on appeal but also other errors as we do in such cases. Rules of Crim. Proc., Rule 36.24. We find no prejudicial error was committed and affirm the judgment and sentence of the trial court.

The first three arguments of error are related and will be discussed together.

I.

The trial court erred in denying the defendant's motions for a mistrial and motions for a second change of venue when it was shown during voir dire of the jury that a fair and impartial jury could not be selected to try this case.

II.

The trial court erred in overruling the defendant's motions to declare Arkansas' venue statutes (Ark. Stat. Ann. Sections 43-1507 and 1518) which permits only one change of venue and Article 2, Section 10 of the Arkansas Constitution which permits a change of venue only to another county in the judicial circuit unconstitutional in violation of the fair trial and due process clauses of the United States Constitution and in refusing to change the venue the second time to a county where the defendant can receive a fair and impartial trial.

III.

> The trial court erred in refusing to grant the defendant's motion to excuse jurors for cause (either as a group or singly) and requiring the defendant to exhaust his preemptory challenges to excuse them and to take several jurors who should have been excused for trial.

The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. Irvin v. Dowd, 366 U.S. 717 (1961); Swindler v. State, supra; Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 341 (1979).

Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.

While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' voir dire examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in Swindler v. State, supra or Ruiz & Van Denton v. State, supra.

Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark. Stat. Ann. §43-1502.

The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his peremptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first Swindler case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in Irvin v. Dowd, supra. It reads:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at ~~719~~ ..722-723

Deciding to seat a juror challenged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. Jones v. State, 264 Ark. 935, 576 S.W.2d 198 (1979).

Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing; another had read or heard nothing of the case, except from her husband; one knew nothing of the facts but only vaguely recalled "something' about it; another had read,some three weeks before this trial, the local paper

in Scott County about the killing; one recalled some news accounts and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all the peremptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a peremptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve.

We cannot say the judge clearly abused his discretion in selecting these jurors.

There is no comparison at all between this case and the first Swindler case and the Ruiz & Van Denton case. The appellant cites as controlling the cases of Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966), the case involving Dr. Sam Sheppard. In both Irvin and Sheppard there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the voir dire, as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of Murphy v. Florida, 421 U.S. 794 (1975). In the Murphy case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between Murphy's case and that of Irvin v. Dowd, supra. The Court stated:

> The voir dire in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. ...

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of any juror that would require a new trial.

The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of Irvin v. Dowd,

supra, does not support appellant's argument. The Court in Irvin ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it.[1] Also, the record in the Irvin case, like that in Swindler and Ruiz & Van Denton, was replete with evidence of pretrial publicity and a change of venue was obviously necessary.

It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

IV.

The trial court erred in denying the defendant's motion in limine to prohibit the questions of the veniremen on voir dire about their feelings concerning the death penalty.

V.

The trial court erred in excusing for cause any or all of the four veniremen who expressed opposition to the imposition of the death penalty.

1 The Court noted in Irvin that the state supreme court had held that the Indiana statute could be circumvented if a defendant could not get a fair trial on one change of venue. Irvin v. Dowd, supra, at 721.

These two points were argued as one by the appellant.

The appellant filed a motion in limine, which was denied, asking that the State not be allowed to ask prospective jurors whether they opposed the death penalty. Without citing any authority, it is argued that such a procedure denies a defendant a jury composed of a cross-section of the community and, therefore, violates the fair trial and due process requirements of the United States and Arkansas constitutions. This argument does not have any merit as we will explain in our answer to the fifth assignment of error.

The fifth allegation of error is that four prospective jurors were improperly excused because they expressed opposition to the death penalty. In the case of Witherspoon v. Illinois, 391 U.S. 510 (1968), the practice of permitting a prosecuting attorney to qualify a jury for the death penalty was not prohibited; what was prohibited by Witherspoon is the exclusion of a juror who is not irrevocably opposed to the death penalty.

Of the four prospective jurors excluded by the court on the motion of the State, three of them stated without equivocation that they opposed the death penalty under any circumstances. The other witness did make a statement at one point that he did not believe "he could impose the death penalty." That witness, Hurl Carmack, testified as follows:

> Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?
>
> A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to.

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way. [Emphasis added.]

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

THE COURT: No, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't. [Emphasis added.]

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

We are satisfied that this juror was irrevocably opposed to the death penalty and the court was not wrong in excluding the juror for that reason. See McCree v. State, 266 Ark. _____ (September 10, 1979).

VI.

The trial court erred in overruling the defendant's motion to reduce the charge on the grounds that the Arkansas death penalty is unconstitutional.

The appellant concedes that we have consistantly ruled this point to be without merit, beginning with Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), and in every case thereafter where the question has been raised.

VII.

The trial court erred in denying the defendant's motion to reduce the charge on the grounds that causing the death of a police officer in the line of duty should not constitute the offense of capital murder.

The appellant concedes that we held this argument to be without merit in the first appeal. Swindler v. State, supra.

VIII.

The trial court erred in overruling the defendant's motion to reduce the penalty on the grounds that death by electrocution is cruel and unusual punishment.

The appellant concedes that we held this argument to be without merit in the case of Ruiz & Van Denton v. State, supra.

IX.

The trial court erred in permitting in evidence any weapons other than the alleged murder weapon over the defendant's objection on relevancy grounds.

The appellant concedes that we held this argument to be without merit in the first appeal. Swindler v. State, supra.

X.

The trial court erred in permitting in evidence in rebuttal, testimony and exhibits about highway signs along Interstates 40 and 540 over the defendant's objections on relevancy grounds.

The appellant argues that the State simply called two policemen before the jury to prejudice them by showing that policemen were interested in the case so the defendant would receive the death penalty. The State argues that the testimony of the policemen regarding the signs used was to impeach Swindler's testimony that he was looking for Highway 71 to go to Kansas City. The officers' testimony indicated that there were two exits, before the exit Swindler took to the service station, which were clearly marked "Highway 71 North," thereby impeaching to some degree Swindler's testimony that he was looking for a way to reach Highway 71. We find no merit at all to the appellant's conclusion that the officers were used to prejudice the jury. Certainly we find no prejudicial error resulting from the testimony.

XI.

The trial court erred in denying the defendant's motions for a directed verdict and to reduce the charge at the close of the state's case and when both sides rested.

Essentially this argument was answered in Swindler v. State, supra. We view the evidence on appeal most favorable to the appellee.

Viewed in that light there was substantial evidence of premeditation and deliberation. The four loaded guns were enough circumstantial evidence for the jury to conclude that he intended to use them; this, together with the two eyewitnesses' testimony is substantial evidence of the elements of the crime of capital felony murder.

XII.

The trial court erred in denying the defendant's motion for a continuance of the sentencing stage of the trial so that the defendant could present an expert witness who was prepared to testify that the cruel nature of death by electrocution and possibility of rehabilitation are mitigating circumstances.

Whether a trial court grants or denies a continuance is a matter of discretion and we only set aside a ruling if we find the court abuses that discretion. Russell & Davis v. State, 262 Ark. 447, 559 S.W.2d 7 (1977). We find no such abuse in this case. This argument is misplaced because whether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark. Stat. Ann. §43-2611 (Repl. 1977).

XIII.

The trial court erred in permitting in evidence over the defendant's objection State Exhibit #55 which purported to reflect that the defendant had been convicted of armed robbery and in overruling the defendant's objection to Sentencing Instruction (A) which permitted the jury to find that the defendant committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

We ruled this evidence admissible on the first appeal. Swindler v. State, supra.

XIV.

The trial court erred in overruling the defendant's objection to Sentencing Instruction (B) which permitted the jury to find that the defendant in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than the victim.

We ruled against the appellant on this same issue in the first Swindler case. However, it is argued that the testimony was substantially different in this case. Swindler's attorney cross-examined in detail the witness Tinder who was inside the service station at the time of the killing. He argues that it was impossible for Swindler to have intended to create a great risk of death to other people. We disagree. The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. The question is, was there sufficient evidence to support a finding that Swindler knowingly created a great risk of death

to other people. There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, all those loaded guns, and even Swindler's own testimony.

XV.

The trial court erred in permitting in evidence over the defendant's objections State's Exhibits #56 and #57 which were a computer printout message, complaint and warrant for defendant's arrest for unlawful flight to avoid prosecution and in overruling the defendant's objection to Sentencing Instruction (D) which permitted the jury to find as an aggravating circumstance that the capital murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody.

We ruled against the appellant's argument on this issue in the first appeal. Swindler v. State, supra.

XVI.

The death verdict was returned on the basis of passion and prejudice by the jury and when this court compares death penalty cases, the death verdict should be set aside and the defendant be sentenced to life without parole.

We find no evidence that the jury's verdict was based on passion or prejudice. We adhere to the majority opinion in Collins v. State, supra, which says that we will compare death penalty cases and that we can reduce a sentence if we find it was the result of passion and prejudice. We have reduced one death sentence to life without parole. Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977). Comparing this killing to others that we have considered, there is hardly any room for argument that the appellant has any grounds for asking for leniency.

In conclusion, Swindler received a fair trial. Therefore, the judgment and sentence in this case are affirmed.

Affirmed.

Harris, C.J., not participating.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER,	)	
	)	
PETITIONER	)	
	)	
	)	
VS.	)	
	)	No _____
	)	
	)	
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
RESPONDENT	)	

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX III
Opinion of Arkansas Supreme Court
Swindler v. State, 267 Ark. 418, 592 SW2nd 91

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

10 pp

John Edward SWINDLER, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 79-116.

Supreme Court of Arkansas.

Dec. 17, 1979.

Following reversal of defendant's capital felony murder conviction and remand, 264 Ark. 107, 569 S.W.2d 120, defendant was again convicted before the Circuit Court, Scott County, David Partain, J., of capital felony murder, and he appealed. The Supreme Court, Hickman, J., held that (1) defendant failed to establish such prejudice in the community or bias on the part of any juror as would require a new trial, since no evidence was offered of pretrial publicity, trial court excluded over 70 prospective jurors for cause, and since trial court did not abuse its discretion in selecting the three jurors whom defense had challenged for cause; (2) Arkansas statute which permitted only one change of venue, and that to a county within the judicial circuit, was not unconstitutional on its face; (3) trial court did not err in permitting questions of veniremen on voir dire about their feelings concerning the death penalty and in excusing for cause the four veniremen who expressed opposition to the imposition of death penalty; (4) evidence sustained conviction; (5) evidence was insufficient to warrant submission of instruction which permitted jury to find that defendant, in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than victim, and (6) death penalty imposed upon defendant was not shown to have been the result of passion or prejudice by the jury.

Affirmed.

1. Jury ⇐33(2)

If, because of pretrial publicity, an impartial jury cannot be seated to try defendant, his right to fair trial is violated.

Ark.Cases 582 S.W.2d—1

2. Criminal Law ⇐134(2)

Affidavits or sworn testimony must be offered to support a motion for change of venue. Ark.Stats. § 43-1502.

3. Jury ⇐97(1)

Deciding to seat a juror challenged for bias is a discretionary matter with trial judge; to reject potential juror, judge must be satisfied that juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to rights of defendant.

4. Jury ⇐103(7)

In prosecution for murder, trial court did not abuse its discretion in seating three jurors whom defense counsel had challenged for cause and who had read and heard about the case, since all three jurors said they could set aside their ideas and information and give defendant a fair trial and since all were selected when the defense had remaining a peremptory challenge.

5. Criminal Law ⇐918(3)

Defendant who was convicted of murder failed to establish such prejudice in the community or bias on the part of any juror as would require a new trial, since no evidence was offered of pretrial publicity, trial court excluded over 70 prospective jurors for cause, and since trial court did not abuse its discretion in selecting the three jurors whom defense had challenged for cause.

6. Criminal Law ⇐116

Arkansas statute which permitted only one change of venue, and that to a county within the judicial circuit, was not unconstitutional on its face. Ark.Stats. §§ 43-1507, 43-1518.

7. Criminal Law ⇐126(1)
Jury ⇐149

In prosecution for murder, the single fact that over 80% of jurors questioned were excused for cause was not sufficient to find that mistrial should have been granted or change of venue ordered.

8. Jury ⇐108, 131(8)

In prosecution for murder, trial court did not err in permitting questions of veniremen on voir dire about their feelings concerning the death penalty and in excusing for cause the four veniremen who expressed opposition to the imposition of death penalty.

9. Criminal Law ⇐1213

The Arkansas death penalty statute is constitutional. Ark.Stats. § 41-2611.

10. Homicide ⇐354

Causing the death of a police officer in the line of duty constitutes the offense of capital murder.

11. Criminal Law ⇐1213

Death by electrocution does not constitute cruel and unusual punishment for the offense of capital murder. Ark.Stats. § 43-2611; U.S.C.A.Const. Amend. 8.

12. Criminal Law ⇐404(4)

In prosecution for murder, trial court did not err in permitting in evidence weapons which were found in or near defendant's vehicle but which were not the alleged murder weapon.

13. Criminal Law ⇐683(1)

In prosecution for murder, trial court did not err in permitting in evidence, in rebuttal, testimony and exhibits about certain highway signs near the scene of the crime, since such testimony was used to impeach defendant's testimony that he was looking for a specific highway at the time of the crime.

14. Homicide ⇐250

Evidence in prosecution for capital felony murder sustained conviction.

15. Criminal Law ⇐586, 1151

Whether trial court grants or denies continuance is a matter of discretion and such ruling will be set aside only for abuse of discretion.

16. Criminal Law ⇐986.6(1)

In prosecution for murder, trial court did not err in denying defendant's motion for a continuance of sentencing stage so that defendant could present an expert witness who was prepared to testify that the cruel nature of death by electrocution was a mitigating circumstance, since question of whether death by electrocution is cruel and unusual punishment is a question of law and not of fact and is not a circumstance to be considered when jury deliberates on mitigating circumstances. U.S.C.A.Const. Amend. 8.

17. Criminal Law ⇐369.2(4), 673(5)

In prosecution for murder, trial court did not err in permitting in evidence an exhibit which purported to reflect that defendant had been convicted of armed robbery and in overruling defendant's objection to instruction which permitted jury to find that defendant committed another felony, an element of which was the use of threat of violence to another person.

18. Homicide ⇐285

Evidence in prosecution for murder was sufficient to warrant submission of instruction which permitted jury to find that defendant in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than victim.

19. Homicide ⇐186(1)

In prosecution for murder, trial court did not err in admitting in evidence a complete criminal message, complaint and warrant for defendant's arrest for unlawful flight to avoid prosecution.

20. Homicide ⇐354

In prosecution for murder, jury was permitted to find as an aggravating circumstance that capital murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody.

21. Homicide ⇐354

Death penalty imposed upon defendant convicted of capital murder was not shown to have been the result of passion or prejudice by the jury.

Donald R. Langston and John W. Steele, Ft. Smith, for appellant.

Steve Clark, Atty. Gen., by Sylvyn Leone Davis, Asst. Atty. Gen., Little Rock, for appellee.

HICKMAN, Justice.

John Edward Swindler's first trial for killing Randy Bassett, a Fort Smith police officer acting in the line of duty, was held in February, 1977. He was found guilty of capital murder and sentenced to die by electrocution. His trial was held in Fort Smith, Sebastian County. We reversed that conviction because the court failed to grant a change of venue and because the court failed to excuse three jurors. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 130 (1978). The case was tried again but this time in Scott County, an adjacent county to the judicial district. Swindler was convicted the second time of capital murder and received the same sentence. This is an appeal from that conviction.

The shooting occurred when Swindler stopped off at Fort Smith, Arkansas apparently enroute to Kansas City from South Carolina. He pulled into the Road Runner Service Station just off Interstate 540, which bypasses downtown Fort Smith. It was about 5:00 p. m., Friday afternoon, September 2, 1976.

Bassett, a Fort Smith policeman who was on duty, had stopped to drink a coke with Carl Tinder at the Road Runner Service Station. Tinder ran the service station, which included a small convenience store. Bassett had in the past dropped by from time to time to drink coffee or a coke with Tinder. As they were talking at the counter, inside the station-store, Swindler drove up and parked his vehicle in the middle lane of three lanes under the station canopy. His vehicle was headed east, the driver's side facing the front of the station-store. Swindler went in and asked for directions to Kansas City. Bassett and Tinder told him how to proceed.

Swindler went back outside, raised the hood on his vehicle and was looking after the vehicle when Bassett left the station-store. Bassett got in his police vehicle, which was parked nearby, and drove around to the other side of the station, parking his vehicle to the rear of Swindler's. Apparently, Bassett made a radio call and then walked up to Swindler.

Two witnesses testified that Swindler shot and killed Bassett as the officer stood at the car door on the driver's side. Bassett had not pulled his gun until after he was shot. Tinder was one of these eyewitnesses; he was inside the store; the other witness was a man named Steve Cardwell who said he was outside the station.

Bassett was able to fire five or six times through the car door before he died. Bassett fell back, fatally wounded. Swindler, although he was injured, was able to drive off. He was arrested shortly thereafter. The State Police District Headquarters was just across the street from the station.

Four guns and a rifle scope, as well as some ammunition, were found near the vehicle: a 38 Colt revolver, a 38 Smith and Wesson revolver, a 9 shot 22 automatic pistol, all fully loaded, and a 22 caliber rifle containing three live rounds. Over 200 rounds of live ammunition for the rifle were found in or near the vehicle. This evidence was introduced over Swindler's objections.

Swindler's version as to the actual shooting differed. He said he saw the policeman get in his car and thought he was leaving. Swindler went back to seeing after his car and had just gotten into it when he heard a "cock," as a hammer being cocked on a pistol, heard something said to the effect, "damn hippie," and was shot. He said he had a pistol in his belt and another in his pocket and, just as he was laying down the pistol he had taken from his belt, this happened, he turned instinctively and the gun went off. He said he did not know it was a policeman until after he fired. He claimed he was shot first.

He remembered seeing Tinder inside the station-store. He recalled after the shooting seeing some children about on bicycles. He did not recall seeing the other eyewitness, Cardwell.

The first trial was preceded by news coverage of the killing, of the funeral of the police officer, and of Swindler's past. The coverage was substantial. In some instances the stories contained material that could and, in fact did, result in prejudice to Swindler's right to a fair trial at that time in Sebastian County. The extent of that coverage was discussed at length in our opinion deciding the first appeal. Chief Justice Carleton Harris, in a concurring opinion, especially addressed the problem created by the news coverage of the killing and its relation to Swindler's first trial.

Although the appellant in this case argues some of the same issues regarding a prejudiced community and jury, there is no evidence at all in this record of unfavorable pretrial publicity. The record we have regarding these arguments consists solely of the *voir dire* examination of veniremen (prospective jurors) from Scott County.

We have examined the record not only as to those allegations of error raised on appeal but also other errors as we do in such cases. Rules of Crim.Proc., Rule 36.24. We find no prejudicial error was committed and affirm the judgment and sentence of the trial court.

The first three arguments of error are related and will be discussed together.

I

The trial court erred in denying the defendant's motions for a mistrial and motions for a second change of venue when it was shown during *voir dire* of the jury that a fair and impartial jury could not be selected to try this case.

II

The trial court erred in overruling the defendant's motions to declare Arkansas' venue statutes (Ark.Stat.Ann. Sections 43-1307 and 1518) which permits only one change of venue and Article 7, Section 10 of the Arkansas Constitution which permits a change of venue only to another county in the judicial circuit unconstitutional in violation of the fair trial and due process clauses of the United States Constitution and in refusing to change the venue the second time to a county where the defendant can receive a fair and impartial trial.

III

The trial court erred in refusing to grant the defendant's motion to excuse jurors for cause (either as a group or singly) and requiring the defendant to exhaust his peremptory challenges to excuse them and to take several jurors who should have been excused for trial.

[1] The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). *Swindler v. State*, *supra*; *Ruiz & Van Denton v. State*, 265 Ark. 875, 582 S.W.2d 341 (1979).

Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.

While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' *voir dire* examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in *Swindler v. State*, *supra* or *Ruiz & Van Denton v. State*, *supra*.

[2] Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark.Stat.Ann. § 43-1502.

The only evidence we have of prejudicial pretrial publicity is the *voir dire* testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his peremptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first Swindler case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in *Irvin v. Dowd, supra*. It reads:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at 722, 729, 81 S.Ct. at 1642, 1643.

[3] Deciding to seat a juror challenged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. *Jones v. State*, 264 Ark. 935, 576 S.W.2d 198 (1979).

[4] Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing, another had read or heard nothing of the case, except from her husband, one knew nothing of the facts but only vaguely recalled "something" about it, another had read, some three weeks before this trial, the local paper in Scott County about the killing; one recalled some news accounts and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all the preemptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a peremptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve. We cannot say the judge clearly abused his discretion in selecting these jurors.

[5] There is no comparison at all between this case and the first *Swindler* case and the *Ruiz & Van Denton* case. The appellant cites as controlling the cases of *Irvin v. Dowd, supra*, and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the case involving Dr. Sam Sheppard. In both *Irvin* and *Sheppard* there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the *voir dire*, as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). In the *Murphy* case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between *Murphy's* case and that of *Irvin v. Dowd, supra*. The Court stated:

> The *voir dire* in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside.

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of any juror that would require a new trial.

[6] The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of *Irvin v. Dowd, supra*, does not support appellant's argument. The Court in *Irvin* ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it.[1] Also, the record in the *Irvin* case, like that in *Swindler and Ruiz & Van Denton*, was replete with evidence of pretrial publicity and a change of venue was obviously necessary.

It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

[7] The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

IV.

The trial court erred in denying the defendant's motion *in limine* to prohibit the questions of the veniremen on *voir dire* about their feelings concerning the death penalty.

V.

The trial court erred in excusing for cause any or all of the four veniremen who expressed opposition to the imposition of the death penalty.

[8] These two points were argued as one by the appellant.

The appellant filed a motion *in limine*, which was denied, asking that the State not be allowed to ask prospective jurors whether they opposed the death penalty. Without citing any authority, it is argued that such a procedure denies a defendant a jury composed of a cross-section of the community and, therefore, violates the fair trial and due process requirements of the United States and Arkansas constitutions. This argument does not have any merit as we will explain in our answer to the fifth assignment of error.

The fifth allegation of error is that four prospective jurors were improperly excused because they expressed opposition to the death penalty. In the case of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the practice of permit-

1. The Court noted in *Irvin* that the state supreme court had held that the Indiana statute could be circumvented if a defendant could not get a fair trial on one change of venue. *Irvin v. Dowd, supra*, 366 U.S. at 721, 81 S.Ct. 1639.

ting a prosecuting attorney to qualify a jury for the death penalty was not prohibited; what was prohibited by *Witherspoon* is the exclusion of a juror who is not irrevocably opposed to the death penalty.

Of the four prospective jurors excluded by the court on the motion of the State, three of them stated without equivocation that they opposed the death penalty under any circumstances. The other witness did make a statement at one point that he did not believe "he could impose the death penalty." That witness, Murl Carmack, testified as follows:

Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?

A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to.

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. *Well, I wouldn't then, I will put it that way.* [Emphasis added.]

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

THE COURT: No, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. *I wouldn't.* [Emphasis added.]

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

We are satisfied that this juror was irrevocably opposed to the death penalty and the court was not wrong in excluding the juror for that reason. See *McCree v. State*, 266 Ark. ___, 585 S.W.2d 938 (1979).

VI.

The trial court erred in overruling the defendant's motion to reduce the charge on the grounds that the Arkansas death penalty is unconstitutional.

[9] The appellant concedes that we have consistently ruled this point to be without merit, beginning with *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), and in every case thereafter where the question has been raised.

VII.

The trial court erred in denying the defendant's motion to reduce the charge on the grounds that causing the death of a police officer in the line of duty should not constitute the offense of capital murder.

[10] The appellant concedes that we held this argument to be without merit in the first appeal. *Swindler v. State, supra.*

VIII.

The trial court erred in overruling the defendant's motion to reduce the penalty on the grounds that death by electrocution is cruel and unusual punishment.

[11] The appellant concedes that we held this argument to be without merit in the case of *Ruiz & Van Denton v. State, supra.*

IX.

The trial court erred in permitting in evidence any weapons other than the alleged murder weapon over the defendant's objection on relevancy grounds.

[12] The appellant concedes that we held this argument to be without merit in the first appeal. *Swindler v. State, supra.*

X.

The trial court erred in permitting in evidence in rebuttal, testimony and exhibits about highway signs along Interstates 40 and 540 over the defendant's objections on relevancy grounds.

[13] The appellant argues that the State simply called two policemen before the jury to prejudice them by showing that policemen were interested in the case so the defendant would receive the death penalty. The State argues that the testimony of the policemen regarding the signs was used to impeach Swindler's testimony that he was looking for Highway 71 to go to Kansas City. The officers' testimony indicated that there were two exits before the exit Swindler took to the service station, which were clearly marked "Highway 71 North," thereby impeaching to some degree Swindler's testimony that he was looking for a way to reach Highway 71. We find no merit at all to the appellant's contention that the officers were used to prejudice the jury. Certainly we find no prejudicial error resulting from the testimony.

XI.

The trial court erred in denying the defendant's motions for a directed verdict and to reduce the charge at the close of the state's case and when both sides rested.

[14] Essentially this argument was answered in *Swindler v. State, supra.* We view the evidence on appeal most favorable to the appellee. Viewed in that light there was substantial evidence of premeditation and deliberation. The four loaded guns were enough circumstantial evidence for the jury to conclude that he intended to use them; this, together with the two eyewitnesses' testimony is substantial evidence of the elements of the crime of capital felony murder.

XII.

The trial court erred in denying the defendant's motion for a continuance of the sentencing stage of the trial so that the defendant could present an expert witness who was prepared to testify that the cruel nature of death by electrocution and possibility of rehabilitation are mitigating circumstances.

[15, 16] Whether a trial court grants or denies a continuance is a matter of discretion and we only set aside a ruling if we find the court abuses that discretion. *Russell & Davis v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977). We find no such abuse in this case. This argument is misplaced because whether death by electrocution is cruel and unusual punishment is a question of law and not of fact, nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark.Stat.Ann. § 41-3614 (Repl.1977).

XIII.

The trial court erred in permitting in evidence over the defendant's objection State Exhibit # 55 which purported to reflect that the defendant had been convicted of armed robbery and in overruling the defendant's objection to Sentencing

Instruction (A) which permitted the jury to find that the defendant committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

[17] We ruled this evidence admissible on the first appeal. *Swindler v. State*, *supra*.

XIV.

The trial court erred in overruling the defendant's objection to Sentencing Instruction (B) which permitted the jury to find that the defendant in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than the victim.

[18] We ruled against the appellant on this same issue in the first *Swindler* case. However, it is argued that the testimony was substantially different in this case. Swindler's attorney cross-examined in detail the witness Tinder who was inside the service station at the time of the killing. He argues that it was impossible for Swindler to have intended to create a great risk of death to other people. We disagree. The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity, Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. The question is, was there sufficient evidence to support a finding that Swindler knowingly created a great risk of death to other people. There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, all those loaded guns, and even Swindler's own testimony.

XV.

The trial court erred in permitting in evidence over the defendant's objections State's Exhibits # 56 and # 57 which were a computer printout message, complaint and warrant for defendant's arrest for unlawful flight to avoid prosecution and in overruling the defendant's objection to Sentencing Instruction (D) which permitted the jury to find as an aggravating circumstance that the capital murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody.

[19, 20] We ruled against the appellant's argument on this issue in the first appeal. *Swindler v. State*, *supra*.

XVI.

The death verdict was returned on the basis of passion and prejudice by the jury and when this court compares death penalty cases, the death verdict should be set aside and the defendant be sentenced to life without parole.

[21] We find no evidence that the jury's verdict was based on passion or prejudice. We adhere to the majority opinion in *Collins v. State*, *supra*, which says that we will compare death penalty cases and that we can reduce a sentence if we find it was the result of passion and prejudice. We have reduced one death sentence to life without parole. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977). Comparing this killing to others that we have considered, there is hardly any room for argument that the appellant has any grounds for asking for leniency.

In conclusion, Swindler received a fair trial. Therefore, the judgment and sentence in this case are affirmed.

Affirmed.

HARRIS, C. J., not participating.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

(3)

JOHN EDWARD SWINDLER,
PETITIONER

VS.

No _____

A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX IV
Opinion of Arkansas Supreme Court
Swindler v. State, 264 Ark. 107, 569 SW2nd 120

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

John Edward SWINDLER, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR77-189.

Supreme Court of Arkansas,
In Banc.

July 17, 1978.

Rehearing Denied Sept. 5, 1978.

Defendant was convicted in Circuit Court, Sebastian County, John G. Holland, J., of the capital felony-murder of a police officer, and he appealed. The Supreme Court, Byrd, J., held, inter alia, that reversible error occurred when the trial court denied defendant's motion for change of venue.

Reversed and remanded for new trial.

Harris, C. J., and Howard, J., concurred and filed opinions.

Fogleman, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐126(2)

In view of pretrial publicity concerning alleged murder of police officer by defendant and indications during jury voir dire that it would be impossible to select 12 persons who either did not have fixed opinion as to defendant's guilt or could not ascertain such opinion and base decisions solely on law and evidence presented in court, trial court abused its discretion in denying defendant's motion for change of venue in capital felony-murder prosecution.

2. Jury ⇐83(3), 90

Trial court erred in refusing to disqualify for cause in murder prosecution 17-year co-worker of father of slain victim, a policeman, who had taken time to give his condolences to such father, and employee of law enforcement agency.

3. Jury ⇐85

Where juror testifies that he is not sure that he can lay aside his previous impressions or opinions, no discretion on part of court can add any assurance that verdict will be rendered only upon evidence presented in court.

4. Homicide ⇐160

In defendant's prosecution for fatal shooting of policeman, defendant's possession of guns and ammunition other than weapon used to shoot officer was admissible in evidence as tending to show premeditation and deliberation.

5. Homicide ⇐163(1)

Evidence reflecting that murder suspect was on parole from prison was properly introduced as aggravating circumstance. Ark.Stats. § 41-1303.

6. Homicide ⇐166(1)

In capital felony-murder prosecution of defendant for fatally shooting police officer, exhibit consisting of complaint and warrant for defendant's unlawful flight to avoid prosecution was admissible to show that police officer, who was checking registration of defendant's stolen automobile at time of shooting, was shot for purpose of avoiding or preventing lawful arrest. Ark. Stats. § 41-1303.

7. Homicide ⇐268

In capital felony-murder prosecution of defendant for fatally shooting police officer, evidence showing that other persons were within line of defendant's fire and only 24 feet from his weapon at time shot was fired created jury issue as to whether defendant created great risk of death to person other than victim. Ark.Stats. § 41-1303.

8. Criminal Law ⇐730(5)

Trial court in capital felony-murder prosecution did not err in preventing defense counsel from misquoting law during his closing argument by requiring that, while arguing that killing of police officer was status killing and that death penalty would not be involved if defendant had been just ordinary person rather than escaped felon, argument be qualified by statement that counsel's premise would be a correct "in some circumstances." Ark. Stats. § 41-1303.

9. Criminal Law ⇐1084

If it appeared that defendant's execution for capital felony-murder would take place before he could exercise his right of appeal because of necessary delay in obtaining transcript testimony, defendant could have filed partial record with Supreme Court, consisting of only judgment entered by trial court, and have obtained stay from such court.

10. Criminal Law ⇐1213

Arkansas death penalty statute was not unconstitutional. Ark.Stats. § 41-1303.

11. Homicide ⇐347

Supreme Court would decline invitation to reduce defendant's death sentence, imposed after he was convicted of capital felony-murder for fatal shooting of policeman, to life without parole in view of eyewitness testimony that defendant shot policeman twice before officer drew his gun. Ark. Stats. § 41-1303.

12. Criminal Law ⇐641.10(1)

There was no merit in murder defendant's contention that trial court should have relieved public defender and appointed him private counsel.

13. Judges ⇐50

There was no merit to contention of murder defendant that trial judge should have disqualified himself.

14. Homicide ⇐351

Capital felony-murder statute was not invalid on theory that killing of ordinary citizen under same circumstances in which policeman was killed is only first-degree murder and carries maximum penalty of life imprisonment. Ark.Stats. § 41-1303.

15. Criminal Law ⇐394.6(1)

Where defendant in homicide prosecution was unable to show any prejudice resulting from any alleged suppressed evidence, and pointed to no evidence that was allegedly obtained illegally and used against him, he could not contend on appeal that trial court erred in failing to suppress any evidence.

16. Homicide ⇐250

Defendant's conviction for capital felony-murder was supported by evidence that, while police officer was checking registration of vehicle being driven by defendant, defendant, under pretense of getting registration out of vehicle, sat down in automobile front seat and shot officer before officer had pulled gun. Ark.Stats. § 41-1303.

17. Homicide ⇐309(3)

In prosecution of defendant for capital felony-murder of police officer, trial court did not err in amending self-defense instructions to incorporate provisions of statute to effect that person may not use deadly physical force in self-defense if he knows that he can avoid necessity of using that force with complete safety. Ark.Stats. §§ 41-507, 41-1303.

18. Criminal Law ⇐755½

Defendant's claim of self-defense, advanced in his prosecution for capital felony-murder of police officer, did not render jury instruction to effect that premeditation and deliberation could be inferred from circumstances of case an impermissible comment on evidence.

19. Criminal Law ⇐629

Defendant in capital felony-murder prosecution was not prejudiced, and suffered no violation of constitutional rights, by invocation of rule requiring that trial court be informed before trial of nature of any defense which defense counsel intends to use at trial, and names of witnesses. Rules of Criminal Procedure, rule 19.3.

Don R. Langston, Fort Smith, for appellant.

Bill Clinton, Atty. Gen. by Garner L. Taylor, Jr., Asst. Atty. Gen., Little Rock, for appellee.

BYRD, Justice.

Appellant killed Officer Randy Bassett of the Fort Smith Police Department at the Road Runner service station on Kelly Highway which is located just off Interstate 540 and across from the State Police District

Ron Strumbaugh, a State Farm Insurance Agent, testified on direct that he thought appellant could receive a fair trial in Sebastian County. On cross-examination Mr. Strumbaugh admitted that from the news media he was familiar with appellant's background and stated that he thought the defense in appellant's case was unpopular.

In all the trial court heard six witnesses on behalf of appellant testify that appellant could not get a fair trial and 24 witnesses for the State who stated on direct examination that appellant could get a fair trial. On cross-examination each witness for the State testified much like Bill Hayes, Jack Ragsins and Ron Strumbaugh. At the end of the testimony the trial court denied the motion for a change of venue. Following the selection of the jury and the two alternates, appellant again raised his motion for a change of venue and again it was denied.

The record shows that in the voir dire of the jury 62 prospective jurors were questioned. Twenty-three jurors were excused for cause. Appellant exhausted his twelve peremptory challenges and moved to excuse for cause eleven of the twelve jurors selected. In selecting the two alternates appellant exercised his one peremptory challenge and the trial court excused eight for cause. Every juror selected to try appellant except G. C. Whitfield knew appellant's background from the news media. Juror Phyllis Russell stated that from the media she knew that appellant had been in prison. She also remembered that appellant was wanted for questioning. She had the opinion that appellant did it. She couldn't say whether or not these things she had heard would have any effect on her verdict. She didn't think she could say that it would not have any effect.

Typical of the jurors excused for cause is Mrs. Clarence Anderson who stated "I have my mind made up and I don't believe I can change my opinion." Another example is Herman Yandell who stated that he had heard other people say that the officers caught appellant right in the act and that they didn't see how appellant could be anything other than guilty. He concluded that these conversations would color his verdict. Along this same vein is the testimony of Mary Ellen Jessee (excused by the State) that perhaps some of this information she had obtained before coming to court would influence her in some way if she were selected as a juror.

Among the jurors peremptorily challenged by appellant were Hubert Davis and Wanda Foster. Hubert Davis had worked for the same company with the father of Officer Bassett for 17 years. Since Officer Bassett's death, he has told his father he was sorry to hear it. Wanda Foster had worked at the United States Marshall's Office for the last eight and one-half years. Robert Taake stated that he could not be one hundred percent sure that he would not let the news media information affect his verdict.

We agree with the State that the trial court has wide discretion in deciding whether to grant a change of venue and that unless the trial court abuses its discretion, the trial court's order is conclusive on appeal. We also agree with the State that the burden of proof is upon the defendant moving for a change of venue to make credible proof to support his motion. However, when we view the record before us as it appeared when appellant renewed his motion for a change of venue after the jury was selected, we must hold that the trial court abused its discretion in denying the motion for a change of venue. The voir dire of the jury corroborates the testimony of Alan Wooten, Tom Anderson and Robert Taylor that it would be very difficult to find twelve people who could put all of the news media information aside.

[2] POINT II. We also agree with appellant that the trial court, under the circumstances, erred in holding that Hubert Davis, Wanda Foster and Robert Taake were qualified to serve as jurors. In an emotionally packed trial involving the killing of an officer by an ex-convict where the only real issue is a sentence of life or a sentence of death, it can hardly be said that a 17 year co-worker of the father of the

slain policeman, who has taken the time to give his condolence to the father, is an unbiased juror. Neither should an employee of a law enforcement agency be considered a competent juror where the killing results from an assault upon an officer of the law while acting in the scope of his employment. Robert Tanke did not qualify as an impartial juror, *Glover v. State*, 248 Ark. 1280, 455 S.W.2d 670 (1970).

[3] We agree with the State that the question of a juror's qualification rests within the sound discretion of the trial court and that the proper test is whether the prospective juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court. However, where the juror testifies that he is not one hundred percent sure that he can lay aside his previous impressions or opinions, we do not see how any discretion on the part of the court can add any assurance that the verdict will be rendered only upon the evidence presented in court.

[4] POINT III. The evidence showed that at the time of the shooting appellant had in his possession guns and ammunition other than the snub nosed .38 caliber he used to shoot Officer Basnett. Appellant objected to the introduction of these items on the basis that they had no relevant connection with the offense. We agree with the State that under the circumstances the big cache of guns by one just shortly out of Leavenworth prison and wanted for two murders in South Carolina would tend to show that there had been some premeditation and deliberation about how he should act in the event he was approached by a policeman. After all, one does not ordinarily walk around in a civilized society loaded and ready to shoot for bear.

[5] POINT IV. State's Exhibit No. 47, reflecting that appellant was on parole from Leavenworth prison was introduced as an aggravating circumstance pursuant to Ark.Stat.Ann. § 41-1308 (Repl.1977), which provides:

"Aggravating circumstances shall be limited to the following:

. . . .

(1) the capital murder was committed by a person subject to imprisonment, suspension, on probation as a result of being found guilty of a felony."

Appellant contends that when we strictly construe Ark.Stat.Ann. § 41-1303, *supra*, the trial court erred in admitting State's Exhibit No. 47. Since the purpose of both probation and parole is to give conditional freedom to one convicted of a felony, we find no merit in appellant's contention that his parole on his felony conviction did not amount to an aggravating circumstance within the meaning of Ark.Stat.Ann. § 41-1303, *supra*.

[6] POINT V. Ark.Stat.Ann. § 41-1305 (Repl.1977), provides:

"Aggravating circumstances shall be limited to the following:

. . . .

(6) the capital murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody."

State's Exhibit No. 49, being a complaint and warrant for appellant's unlawful flight to avoid prosecution, was admissible to show that Officer Basnett, who was checking on the registration of appellant's stolen automobile at the time of the shooting, was shot for the purpose of avoiding or preventing a lawful arrest.

[7] POINT VI. As we read the record, appellant's automobile was headed east which would place his automobile with the door on the driver's side next to the station in which Carl Tinder and another customer were located at the time appellant started firing at Officer Basnett through the door on the driver's side of his car. Since this would place the people inside the station within the line of fire and only 23 feet from appellant's gun, we cannot say that the trial court erred in submitting to the jury the issue of whether appellant created a great risk of death to a person other than the victim.

[8] POINT VII. During the closing argument on the penalty, after the jury had found appellant guilty of capital felony murder, appellant wanted to argue to the jury that the killing of Officer Basnett was a status killing and that the death penalty would not be involved if Basnett had been just an ordinary person. The trial court required appellant to qualify his statement by saying that his premise would be correct "in some circumstances"—*i. e.* the trial court told appellant that he could not misquote the law. Appellant now contends that the trial court unduly restricted his argument and that the conversation with the trial court gave the jury an impression of what the trial judge felt of counsel's argument. The conversation is not likely to arise on a new trial. On the other issue, the trial court has a wide latitude of discretion in controlling the extent, scope, range and propriety of arguments to the jury and we cannot say that he abused his discretion in not permitting appellant to misquote the law.

[9] POINT VIII. Appellant made a great ploy to the Governor to stay appellant's execution on the basis that without the Governor's intervention appellant would have been executed before he could exercise his right of appeal because of the necessary delay in obtaining the transcribed testimony. Appellant overlooked the fact that he could have filed with this court a partial record, consisting of only the judgment entered by the trial court, and have obtained a stay from this court, *Leggett v. State*, 231 Ark. 13, 328 S.W.2d 252 (1959).

[10] Other contentions raised by appellant with reference to the constitutionality of the Arkansas Death Penalty Statute are without merit, *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977).

[11] Finally appellant contends that when we compare this case with others, we should reduce his sentence to life without parole. We find no merit to this contention. Appellant's assertion that "this was a gun battle type situation without a thought of the consequences because of the instinct way the incident occurred" is not supported by the record. Steve Cardwell, an eye witness testified that appellant shot Officer Basnett twice before the officer drew his gun.

[12] POINT IX. Appellant's contention that the trial court should have relieved the public defender and appointed him private counsel has no basis in fact and we consider it without merit.

[13] Appellant's motion to disqualify the trial judge had no merit, *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966). Furthermore, in view of our holding that the trial court should have granted the motion for a change of venue, the issue is not likely to arise on new trial.

[14] Appellant contends that the capital felony murder statute is invalid because the killing of an ordinary citizen under the same circumstances in which a policeman is killed is only first degree murder—*i. e.* life imprisonment at most. We find no merit to this contention, *Finley v. California*, 222 U.S. 28, 32 S.Ct. 13, 56 L.Ed. 75 (1911). A policeman is society's bulwark or badge of security and the killing of a policeman while performing his duties is an attack upon society's security as a whole as compared to an attack upon an individual or the members of his family in the case of an individual. Furthermore, a policeman by the very nature of his duties is required to take risks that an ordinary citizen is not obligated to participate in. There is also the pragmatic consideration that unless courts can be expected to administer justice according to law, then the officers, who must pursue and capture one such as appellant, may have a greater temptation to solve the matter before it gets to court or at least the legislature had the right to consider such matters in making the classification.

[15] Since appellant is unable to show any prejudice resulting from any allegedly suppressed evidence, we fail to see how he is in a position to contend that the trial court erred in failing to suppress any evidence. Appellant has abstracted no evidence that was allegedly obtained illegally and used against him.

[16] The evidence of eye witnesses shows that Officer Bassett in response to an FBI bulletin had reason to check the registration of the automobile appellant was driving. Appellant under the pretence of getting the registration out of the car pocket, sat down in the front seat of the car and shot Officer Bassett with a .32 caliber snub nosed pistol before Officer Bassett had pulled a gun. This evidence when stated most favorably to the State, as we must do on a motion for directed verdict, was ample to sustain the jury's verdict.

[17] Appellant complains of the trial court's amendment of his self-defense instructions to incorporate the provision of Ark.Stat.Ann. § 41-507 (Repl.1977), to the effect that a person may not use deadly physical force in self-defense if he knows that he can avoid the necessity of using that force with complete safety. We can find no merit to this contention.

[18] The trial court in accordance with long practice told the jury that "The premeditation and deliberation defined in these instructions may be inferred from the circumstances of the case." Appellant contends that this instruction amounts to a comment on the evidence because it instructs the jury on facts it can presume. This principle of law has been stated many times, with approval, *Hamilton v. State*, 262 Ark. ——, 556 S.W.2d 884 (1977), and we fail to see how appellant's claimed self-defense makes it a comment on the evidence.

POINT X. Appellant made a number of contentions that are not likely to arise on a new trial such as the appointment of an investigator, and the expense to conduct a poll to show that he could not get a fair trial in Sebastian County and to suppress his incriminating statements.

[19] Rule 18.3 *ref* the Rules of Criminal Procedure permits the trial court to be informed before trial of the nature of any defense which defense counsel intends to use at trial and also the names of witnesses. Such information makes it possible for the parties to have before the court all witnesses, including rebuttal witnesses, that may be called to testify. This information prevents the necessity of giving continuances to get key rebuttal witnesses and on the record before us, we cannot say how appellant has been prejudiced or that any of his constitutional rights have been violated.

Reversed and remanded for new trial.

HARRIS, C. J., and HOWARD, J., concur and file opinions.

FOGLEMAN, J., concurs in part and dissents in part.

HARRIS, Chief Justice, concurring.

I am distressed today that it is necessary that this case be reversed because a change of venue was not granted. I will have to say, after reading this record very carefully, that I am forced to conclude that the reversal is warranted.

From the outset, this homicide received tremendous publicity, as would be expected. The newspaper gave front page headlines, and television and radio likewise gave extensive p[illegible]ity. It would have been almost impossible for people who read or listened to the reports not to have formed an opinion. Of course, the news media were entitled to give full reports of the slaying and of the arrest, and were entirely in order in using the pictures and stories appearing relative to the funeral, which were, after all, a tribute to a young officer performing his duties. But events included in some of the articles really had nothing to do with the slaying itself, and certainly could have been highly prejudicial. I refer to the fact that it was frequently mentioned that Swindler had allegedly committed two brutal murders of teenagers in South Carolina, and that South Carolina officers had come to Fort Smith. The fact that Swindler had a prison record was several times mentioned. In addition, stories pointed out that there were several guns in Swindler's car and that the car was stolen. Television and radio stations gave extensive coverage and personnel of those stations testified as to their "coverage;" for instance, KFPW television has a coverage of about 28,000 homes at 5:00 p.m. and 24,000 homes at 10:00 p.m.; radio station KWHN has AM and FM circulation of 59,000 to 60,000 persons and, all in all, the entire county was "saturated" with news concerning the killing the stories embracing several weeks. Also, a detective magazine, "Inside Detective," distributed by S&S News Agency, Inc., and sold by Butterfield Trail newsstand in Fort Smith, carried a story entitled "God Help the Cop Who Stops This Guy." An article with pictures appears relative to the defendant's case. KISR radio station broadcast ads seven times a day for five days advertising this story.

Thirty people testified relative to whether Swindler could obtain a fair trial in that county (six stating that he could not obtain a fair trial and 24 stating that he could obtain a fair trial.). However, of the last 24, 23 were familiar with the South Carolina charges and 20 were familiar with the fact that Swindler had served time. While most of these people testified that they thought he could obtain a fair trial, it was noticeable that the people they talked with who expressed an opinion considered Swindler guilty; in fact, no one expressed the thought that he might be innocent.

More importantly, of 49 people[1] examined during selection of the jury, 26 stated that from what they had read and heard, Swindler "did it;" 32 were familiar with the South Carolina charges and 21 were aware of his prison record. Some of these people were excused by the court for cause.

With some others, it was necessary that the defense use a peremptory challenge (all of which were exhausted), and when the jury was finally selected, it included four persons who had stated that from what they had heard they thought the man was guilty. Now, of course, each stated that he could set this opinion aside on the basis of the evidence heard and reach a verdict based entirely on the evidence.[1a] While this was the general statement made on direct examination, the prospective jurors answered in a slightly different manner when cross-examined. One juror on the panel had heard about the people killed in South Carolina, and he stated that based on what he had read and heard, his presumption was that the defendant actually shot the officer; that his opinion "right now" is that he did it. He said before he knew he was going to be on the jury panel, he discussed the case with other people and that it was everybody's opinion that he was guilty, and that was his opinion, too. A motion that he be excused for cause was denied and the defendant was forced to exercise a peremptory challenge. Another person, who served as a juror, stated that she "might" have an opinion which she got from the media, but not one that could not be changed, depending on the facts presented in evidence. She was aware that he was supposed to have murdered two people, had heard a lot of talk about the case to be tried, felt that he "probably did it," considering all that was don. and had been said. When asked if she would be able to set aside what she had heard about him being in prison and having been suspected of other crimes, the prospective juror answered, "No. It is bound to have some effect, I should think." A motion to excuse for cause was denied, and this person served on the jury. Another lady who served on the jury stated that she had discussed the case with other people and that they thought it was a foregone conclusion that Swindler killed the officer. She said these people accepted the facts as

1. This does not include the 13 or 14 examined as alternate jurors, since the alternates did not serve.

1a. One juror stated she believed "he did do it," and that she still had that opinion. When asked if the opinion would affect her verdict, she answered, "I couldn't say. I would hope that I would be able to listen to what was brought in with an open mind and take it from there." Still, however, she was unwilling to say "at this particular moment" that her prior feelings would have no effect. The court stated, "I believe when I first questioned Mrs. ——— you said you would hope that you would be able to set aside your opinion and just have you verdict on the evidence of the law. Does that still hold true, that statement?" She answered, "Yes, sir. I hope that I could be that type person and be able to do that." Thereupon, the court refused to grant the motion to excuse her for cause.

they were related in the paper and on television and that she probably came up with a foregone conclusion, too. The defendant's motion to excuse for cause was overruled and this lady served on the jury.

I will just say that I served for a number of years in the prosecuting attorney's office and am now in my 22nd year on this court, and the prospective jurors knew more purported facts about the defendant's background, and based on what had been heard in the news media, more had formed at least tentative opinions as to guilt, than any case I have ever come in contact with.

Of course, what we are confronted with is the age-old problem of trying to work out a balance between the First (free speech) and Sixth (fair trial) Amendments.

I recognize, and the courts have recognized for years, that it would be almost impossible today to draw a jury involving any prominent case where the prospective jurors would be entirely unfamiliar with any alleged facts or issues and that is the reason for the ancient rule, "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." In general, this has been sufficient to qualify a juror to serve. This was commented upon in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. In that case, six murders were committed in the vicinity of Evansville, Indiana. The defendant was arrested and shortly thereafter, police officers issued press releases widely publicized, stating that the defendant had confessed to the six murders. At his request, he was granted a change of venue to the adjoining county, but further change of venue because of inflammatory publicity was denied. Irvin was convicted, and after the conviction was affirmed by the Indiana Supreme Court, Irvin instituted a *habeas corpus* proceeding to the United States Supreme Court. The opinion, in giving some of the facts, states:

> "A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the modus operandi of these robberies was compared to that of the murders and the similarity noted)."

Many of the stories identified the defendant as a parole violator and fraudulent-check artist, and shortly before the trial, carried stories that he had already admitted murders of several other people. The court then quoted the ancient rule (earlier quoted here), but made it clear that a juror exposed to prejudicial publicity is not proven impartial by his mere declaration that he will not allow such evidence to influence him. The court stated:

> "Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

I am not nearly so much concerned about publicity that arises after the trial has commenced. For one thing, the news releases are, in the main, based on what the witnesses actually said, i.e., hearsay or incompetent evidence is not part of such a news story. Then, too, after all, the objective is to protect the jury from becoming aware of outside reports, and if necessary, a jury can be sequestered. But I am disturbed about newspaper stories and television releases that occur at the time, or soon after, the crime occurs, and for days and weeks thereafter, I suppose mainly because there are so few answers (if indeed there are adequate answers) to the problem. Let me make it very clear that I do not favor any "gag" rule and prior restraint is invalid—but though it were otherwise—I still would not favor it since I strongly support a free and unfettered press. Accordingly, I really only know of three things that, at least, constitute a partial answer. First, where publicity, including matters which could well be prejudicial to a fair trial for a defendant, runs rampant throughout the community, a change of venue would have to be granted. This is only partially satisfactory for the reason that our constitution provides that if a change of venue is granted, it shall be to some other county in the same judicial district. Article 2 § 10 Arkansas Constitution. It is hardly necessary to say that, while feelings may not be as strong in an adjoining county, still, the inhabitants of that county are fairly well acquainted with the news stories and the television and radio reports. Certainly, there would be much less prejudice several counties away from the county in which the crime was committed—but that is not possible under our constitutional provision.[2] Of course, Sebastian County is a circuit within itself, and in such event, this case would be transferred to an adjoining county. See *Cockrell v. Dobbs, Judge*, 238 Ark. 345, 381 S.W.2d 756.

Time is the greatest healer for grief or unpleasant occurrences, and it may be that cases of the nature here under discussion should not be set for trial until a sufficient "cooling off period" has elapsed. What amount of time this would involve, I cannot say; of course, it might well be necessary that a defendant move for the continuances to prevent a possible later claim that he had not received a speedy trial. Since the delay would be for his benefit, I cannot see why a defendant would object to taking such a step.

A third possibility is voluntary action on the part of the news media, and after all, a great deal of restraint would not be required. As earlier stated, certainly the media has the right, even the duty, to report crime, and is privileged to give the necessary details of the particular offense; if the suspected perpetrator has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he might present, would also be very much in order.

Perhaps I can briefly summarize information that may well prove prejudicial. The things that I will mention are included in the American Bar Association Standards relating to fair trial and free press, although those standards are much more comprehensive, and I understand under revision at the present time. I do not necessarily agree with all these standards, and I shall only mention those that I consider to go to the "heart of the matter" and only insofar as they relate to the selection of an unbiased and unprejudiced jury. I agree that the following categories of information are

2. Of course, this solution would likewise pose problems since it would be necessary that witnesses, probably most of whom live in the county where the crime occurred, and officials would have to travel to the new county where the trial was to be held, necessitating great expense and inconvenience.

prejudicial to a fair trial[3] and they have been so declared in various court opinions.

"The prior criminal record (including arrests, indictments, or other charges of crime),[4] or the character or reputation of the defendant;

The existence or contents of any confession,[5] admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;

The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;

The possibility of a plea of guilty to the offense charged or a lesser offense;

The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case . . ."

Actually, if only the first two mentioned were omitted from news stories and broadcasts, I feel that a change of venue in many a case would be avoided.

I understand (I use this word because I was not a participant) that a few years ago, a committee composed of attorneys and members of the news media had a number of meetings relative to the American Bar Standards, but never did reach any satisfactory conclusions. Sometime thereafter, a committee representing the Arkansas Bar Association filed a petition with this court, seeking the adoption of five rules to existing rules of criminal procedure, which would have established guidelines covering the release and publication of information in connection with criminal proceedings. The Arkansas Press Association, a leading journalism society (Sigma Delta Chi) and a number of individual newspaper reporters were opposed to the proposed rules. This court unanimously entered an opinion on May 1, 1972, denying the petition. See 252 Ark. 418, 479 S.W.2d 533. We expressed doubt about the constitutionality of some of the proposed provisions and further stated that we were not convinced that we had a problem with court news dissemination that required the adoption of rather rigid rules covering all phases of the subject.[6] I am still of the same view, but certainly wish that something could be done relative to the question of pre-trial publicity that would prevent, or at least minimize, the probability of disqualification of prospective jurors. I really think that a committee composed of judges, lawyers, law enforcement officers, and officials of the media, newspapers, television stations, and radio stations, could review the matter under discussion and come out with a helpful solution (not necessarily the recommendations of the ABA)—perhaps not perfect—but certainly a progressive step in meeting this problem.

I may be well wasting my time in writing this concurrence, but this problem I can foresee as happening again and again. Having to retry a case takes time—it takes money—and a final conclusion is wearisomely protracted. This is neither fair to the public, nor to a defendant, and any efforts that can be made to remedy the situation are worth the try.

I am persuaded that all mentioned, jurists, lawyers, law enforcement officers, members of the news media, and, of course, the citizens of our state, are interested in achieving justice as rapidly and efficiently as possible, and I would hope that suggestions could be offered that would be workable and satisfactory to all concerned.

HOWARD, Justice, concurring.

The United States Supreme Court in reversing the death sentence imposed in the case of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, made the following observation:

"[A] State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law."

In *Witherspoon*, thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, had acknowledged having conscientious or religious scruples against the infliction of the death penalty or against its infliction in a proper case and were excluded without any effort being made to find out whether their scruples would invariably compel them to vote against capital punishment.

One venireman who admitted to a religious scruple against the death penalty when asked: "You don't believe in the death penalty?" She replied: "No." But later she stated she had no religious scruples against capital punishment and further stated that she would not "like to be responsible for [illegible] deciding somebody should be put to death." She was excused.

In *Maxwell v. Bishop, Penitentiary Superintendent*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221, the United States Supreme Court, in reversing this Court's affirmance of *Maxwell's* death sentence,[1] stated:

"As was made clear in *Witherspoon*, 'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.' 'Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position.'"

See also: Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

In *Maxwell*, one prospective juror was successfully challenged for cause solely on the basis of the following exchange:

"Q. If you were convinced beyond a reasonable doubt at the end of the trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?"

"A. I think I do." (Emphasis supplied.)

Still another member of the panel was dismissed after the following dialogue:

"Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?"

3. This summary of categories is taken from (although I have only used a small part) "Courts and the News Media" published by the National College of The State Judiciary, University of Nevada.

4. For instance, in the present case, I think undoubtedly one of the most prejudicial items conveyed to the public was the fact that this defendant was accused of a heinous double murder in South Carolina, and as herein point-ed out, a great majority of the jury panel was familiar with this fact.

5. No confession was involved in the instant case.

6. The proposed rules mainly deal with restrictions on court officials, or events occurring in the courtroom.

1. *See* Maxwell v. State, 256 Ark. 694, 370 S.W.2d 113.

"A. No, I don't believe in capital punishment." (Emphasis supplied)

In the instant case, veniremen were excused from serving on appellant's jury for reasons essentially similar to the ones quoted above in *Maxwell*. For example, one prospective juror was asked:

"Q. Would you vote to impose the death penalty if that were called for under the law of Arkansas?

"A. I doubt it." (Emphasis added)

The prospective juror further testified:

"Q. It wouldn't matter how bad the fact situation was, you would vote against the death penalty?

"A. Yes. I *believe* I have verified that." (Emphasis supplied)

Another prospective juror was excused following this exchange:

"Q. In other words, you would vote against it? You know right now no matter what the fact situation develops here, you know right now you would vote against the death penalty?

"A. I *believe* so." (Emphasis added)

Another prospective juror testified as follows:

"Q. [C]ould you and would you vote for the death penalty?

"A. I don't *think* so." (Emphasis added)

There were other instances where prospective jurors were excused when they voiced general and ambiguous objections to imposing the death sentence. In my judgment, the trial court committed reversible error in excusing these prospective jurors who were not unequivocally committed to the death sentence. In substance, appellant's jury in the words of the Supreme Court in *Witherspoon*, was stacked against the appellant and this cannot be squared with the Sixth and Fourteenth Amendments to the Constitution of the United States.

In the recent case of *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), the United States Supreme Court made the following comment in reversing a death sentence:

"Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings' he cannot be excluded: if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand."

In *Davis*, only one prospective juror had been excluded in violation of the *Witherspoon* standard.

FOGLEMAN, Justice.

I agree that the conviction in this case must be reversed. I do not agree that the trial court abused its discretion in denying a change of venue in this case. The evidence presented left a great deal to surmise as to the state of mind of inhabitants of the entire county. Many of the witnesses who testified in support of the motion actually did little more than express their own opinions and reactions with little basis for knowing the attitudes of more than a few people. An opinion that it would be impossible to select 12 people from 1000 potential jurors, the identities of most of whom should have been unknown, is somewhat conjectural and the examination of 62 of them may or may not be indicative of the attitudes of the remainder. The witnesses who had discussed the case with a limited number of people (e. g., one with 50 to 75; another only with friends and social acquaintances; another with only family members; another with a half dozen or more) did not say what parts of the county these people were from or how representative they were of the entire population. At least one of the witnesses testifying in behalf of the defendant on the motion stated that the frequency of conversations about the case had "definitely reduced" by the time he testified.

I agree, however, that there were abuses of discretion in acting upon appellant's challenges for cause and that jurors who should have been excused for cause actually served on the jury. Others were peremptorily excused by appellant and his peremptory challenges were exhausted. I do not agree, however, that one, who worked for the same company as the father of the officer killed and who had some contact with the father at work and had seen him one time since the son's death, was necessarily biased, even though he naturally told the father that he was sorry to hear of his son's death on the one occasion he had seen him. Neither do I agree that a female employee of the United States Marshal's office should be excused for cause in a case involving the alleged murder of a city patrolman on that ground alone. I do think that this prospective juror's answers on voir dire require that she be excused for cause.

I do not take the majority opinion to require an automatic change of venue upon remand after the passage of 16 months since the trial. The situation may well be different since the pervasive effect of the publicity has diminished. It seems to me that the evidence showed that adjoining counties were permeated by the publicity to about the same extent as Sebastian County.

I do not agree that "probation" and "parole" are synonymous. A strict construction of the capital felony murder statute should prevent our extending the statute beyond its plain words, but in my opinion, one on parole may be and usually is subject to imprisonment. My opinion is based upon the premise I will now undertake to outline.

Probation is the method of treating one found guilty of an offense, whereby he is not imprisoned, but released under supervision and upon specified conditions. Webster's New International Dictionary, 2d Ed. Parole is the conditional and revocable release of a prisoner. Webster's, 2d Ed. The former precedes and is in lieu of imprisonment. The latter follows imprisonment. It is a different manner of serving a sentence than by actual confinement. 59 Am.Jur.2d 9, Pardon & Parole, § 10. Under Arkansas law, he remains in legal custody of the institution from which paroled. Ark.Stat. Ann. § 43-2808 (Repl.1977). The parole board may revoke the parole and order the prisoner returned to actual custody. Ark. Stat.Ann. § 43-2810 (Repl.1977). It is generally held that the prisoner is at all times "subject to imprisonment" as a result of being found guilty of the felony for which he was originally imprisoned. Revocation of parole simply returns the prisoner into actual confinement to serve the original sentence and is punishment for the crime for which that sentence was imposed.

Unless parole under the laws of the jurisdiction in which the parolee was sentenced and paroled differs materially from the Arkansas law, the prisoner is "subject to imprisonment" by termination of the parole until the expiration of the sentence imposed.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER,	)	
	)	
PETITIONER	)	
	)	
	)	
VS.	)	
	)	No _____
	)	
	)	
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
RESPONDENT	)	

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX V
Psychological Evaluation
John Swindler

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

[illegible] October 22 & 25, 1976

PSYCHOLOGICAL EVALUATION #10-76-43

[illegible] V. Taylor, M.D.

PROBLEM: Mr. John Swindler faces criminal charges. He is referred for evaluation of indications of psychosis for use relative to diagnosis and evaluation of competence.

PROCEDURES: Mr. Swindler was seen on two occasions for purposes of administration of tests and observation of behavior. Records indicated that he was illiterate and will not be able to take the Minnesota Multiphasic Personality Inventory. This was confirmed through administration of the Reading subtest of the Wide-Range Achievement Test on which Mr. Swindler obtained a reading grade placement of first year seventh month, well below the level required to take the MMPI. He was administered the Rorschach Inkblot Designs Test, the Draw-A-Person Test and the Wechsler Adult Intelligence Scale.

BEHAVIORAL OBSERVATIONS: On both occasions when he was seen Mr. Swindler was well oriented to time, place and person. He followed a logical, relevant train of thought in describing his history, his activities during the framework of his alleged offense and his current circumstances. He was aware of the charges against him and possible consequences if found guilty, and the purpose of this evaluation. He was fairly pleasant during the evaluation procedures. However, his level of effort and cooperation varried as will be noted below.

One of the most prominent features of Mr. Swindler's accounting of his history was frequent conflict with authority and a lack of remorse over any harm that he had caused to others. He denied any specific symptoms of mental or emotional illness, other than to state that he was somewhat nervous and then commented "She wouldn't be with the charges I've got."

PERSONALITY FEATURES: Mr. Swindler's approach to the Rorschach was generally resistive and negativistic. His response to the first card was typical "Nothing...I don't go for this stuff. It's an inkblot." He responded similarly to all ten cards and appeared to be somewhat irritated that each was presented in turn after he had commented that he was not going to see anything in any of them. On the second day that he was seen a follow-up approach utilizing limits with the Rorschach was employed. In this procedure a few of the various popular responses seen by others were mentioned to Mr. Swindler and he was able to point out in the blot where he thought others probably would see the particular percept mentioned. No psychotic material was elicited on either administration of the Rorschach.

In response to the request to Draw-A-Person, Mr. Swindler commented that he was not much of an artist. He approached the task somewhat reluctantly. However, he produced an adequate drawing with no bizarre or unusual distortions of the human figure.

The Wechsler Adult Intelligence Scale was administered in order to obtain a

sample of Mr. Swindler's behavior under the more structured circumstances afforded by this test. He did perform much more readily and with greater enthusiasm on this task, particularly the performance sections. Early in the test, on the verbal portions, he did have a rather low level of effort, appeared to be giving up rather easily and answering quite frequently with "I don't know." It is noted that he obtained a Full-Scale I.Q. estimate of 90, with a Verbal Scale Score of 81, Performance Scale Score of 101. The Verbal Scale Score is probably unduly low, reflecting his lower level of motivation in taking those tasks. Overall it was felt that he has at least average potential as indicated by the Full Scale Score. Of most interest on this test was Mr. Swindler's ability to attend to the tasks, to follow directions and comprehend what was required of him. No bizarre or unusual behavior was noted during the hour devoted to his taking this particular test.

SUMMARY: Current psychological evaluation gives no indications of the presence of psychotic thought processes. These data suggest the diagnosis of antisocial personality.

John C. Althoff, Ph.D.
Chief Psychologist

JCA/mlr

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL PAGINATION IS NOT COUNTINUOUS.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER, PETITIONER	
VS.	No _____
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT	

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX VI
Testimony of Don Langston
Habeas Corpus Hearing

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

THE COURT: All right. Come forward, Judge.

DON LANGSTON, PETITIONER'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HAGAR:

Q State your name, please, sir.

A Don Langston.

Q And what's your age?

A Forty-nine.

Q And where do you live?

A Fort Smith.

Q And how long have you lived in the Fort Smith area?

A Fifteen years.

Q And what is your profession at the present time?

A I'm the Circuit-Chancery Judge in Sebastian and Crawford Counties, the 12th Judicial District.

Q All right. Back in 1978 what was your profession??

A I was Sebastian County Public Defender.

Q And how long had you been Public Defender in Sebastian County?

A Since December of 1971.

Q And what date were you admitted to the Bar of Arkansas?

A 1961.

Q After your admission to the Bar in the State of Arkansas, what type of practice did you engage in?

A I was a trial attorney for the Arkansas State Highway

Commission for five years.

Q And then that was from 1961 to 1965, '66?

A It was November of '61 until -- I was in six months military duty in '61; then I left the military, came to the Highway Commission in December of -- November of 1961 and stayed with them until January the 1st of 1967.

Q And between 1967 and 1971, what type of work were you in?

A From January of '67 through March of 1970 I was a Deputy Attorney General in charge of their Litigation Division here in Little Rock. Then I became a Deputy Prosecuting Attorney for the remainder of 1970 for Pulaski County in 1970. Then I was a Deputy Prosecuting Attorney in Sebastian County for 11 months in 1971, and then became Public Defender.

Q And you were Public Defender and handled the first trial of John Swindler's case and the second trial; is that correct?

A Yes, sir.

Q You were the only attorney in the first case; is that correct, sir?

A No, I was Assistant -- or we didn't actually say who was the lead attorney, but myself and my deputy at that time, Hubert Graves, represented Mr. Swindler.

Q And in the second case it was you and Mr. John Sexton; is that --

A Settle, yes.

Q Settle. All right. Prior to 1977, you had handled a

great number of criminal cases, jury trials, is that correct?

A I'd say 10, 12, 14 a year, something like that.

Q So you would have had in the six years or so that you had been the Public Defender 50 or 60 jury trials to your credit by that time?

A I suppose so. I didn't keep up with them but it was nine, ten, eleven, something like that, maybe even up to 14, 15.

Q Judge, in preparing a case, a capital murder case for trial, would you not agree that a defense counsel has three intertwined and interrelated functions: He has -- one, one of his goals he would try to achieve would be to acquit his client, and then if he was not able to acquit him to save his life and then to prepare a record or keep a good record for appeal; would you not agree with that, sir?

A I guess as a summarization, that's pretty good.

Q And as the attorney for John Swindler in his first trial, you were also the attorney for the -- on the appeal; is that correct?

A Yes, sir.

Q And in that case, there was a reversal by the Supreme Court of Arkansas; is that not correct?

A Yes, sir.

Q And basically, the Supreme Court reversed on two bases. There was a great deal of pretrial publicity in Sebastian

County, and the Trial Court had seated jurors who should not have been seated because of prejudices?

A Actually my own memory of that is not that good. I did read the material, but that's basically what a brief or a petition or something that I have read said, so I'd just have to rely on that. I don't think they reversed it on any other grounds except jury matters.

Q And the Supreme Court of Arkansas remanded the case, and the case was changed with instructions that it be moved from Sebastian County; is that correct?

A Yes, sir.

Q Do you recall when you first learned of the date that the case was being transferred from Sebastian County to Scott County?

A I would say it would probably have been a month or two after the mandate came from the Supreme Court. I really don't have any independent recollection of the date.

Q In your practice in Fort Smith -- where were you born, Judge Langston?

A Coal Hill, Arkansas, in Johnson County.

Q So you're from that area of Arkansas; are you not?

A Yes, sir.

Q Western part of Arkansas. And I take it that in your practice you have had occasion to be in the Scott County Circuit Court?

A I think the only time I'd ever been in the Scott County Circuit Court was when I represented the Highway Department.

Q But you were not unfamiliar with Waldron and the nature of the community in Scott County?

A Well, it had been in the early Sixties since I had been there.

Q Scott County is a very rural county, is it not?

A Yes.

Q Population, I think you stated in your brief to the Supreme Court about 8300 people. Waldron is a small town of about 2500 people; is that correct?

A I don't recall but it's not a very big place.

Q And it is the county due south of Sebastian County, and Waldron is about 45 miles south of Fort Smith; is it not?

A That sounds correct.

Q There are no daily newspapers published in Waldron, are there?

A Not that I know of.

Q And there are no television stations in Waldron, are there?

A Not that I'm aware of.

Q The media in Waldron and Scott County comes out of primarily Fort Smith, does it not?

A That's the way I recall it.

Q Prior to the second trial, did you do any preparation or

investigation as to the prejudice of persons in Scott County against the Petitioner John Swindler?

A I'm not aware of any.

Q At the second trial, I believe there were about 250 veniremen in the jury wheel, and of those 250, some 40 or some-odd were excused for reasons other than knowledge of the case, I believe. So that there were about 190 veniremen left in the panel at the time that you started the questioning of the jurors; is that correct?

A I'm not sure but that sounds basically correct. I know that there were some that were excused because they were over 65; some were excused because they presented certificates from their doctor that they were not able to serve. There may have been a few other reasons but I can't recall what they were.

Q And the examination of the jurors took a total of about five days, did it not?

A That's my recollection.

Q Okay. And during that examination there was a total of about 79, I believe, jurors who were excused for cause because of the defense -- because they had prejudice against the defendant from information they had received in the media; is that correct?

A You'd have to consult the trial record on that, but that -- I wouldn't dispute that number.

Q There were a great number of persons, of veniremen

who had been -- were excused because of cause; is that correct?

A Yes, sir.

Q The defense did not use its last preemptory challenge until after the 11th juryman or juror had been seated, did they?

A Who didn't?

Q The defense, John Swindler.

A I don't recall. We were closely guarding those preemptory challenges because that's just the way defense does. It could have been at that particular point. I don't recall.

Q In preparation of the first appeal, Judge Langston, you became familiar with the Supreme Court case Irwin V. Dow, did you not?

A Yes, sir.

Q And the Indiana statute on change of venue on that case is very similar to the Arkansas Statute, wouldn't you say?

A I don't recall.

Q One, the Indiana statute allowed one change of venue and to a contiguous county which is similar to the Arkansas statute.

A I think the only thing I recall from that decision was is that Irwin versus Dow said that there could be a second change of venue is the best I recall.

Q Now you did not file a motion for a change of venue from Scott County, did you?

A No, sir.

Q And you did not prepare any affidavits for change of venue, did you?

A No, sir.

Q Would you tell the Court why you did not file a motion for a change of venue?

A Didn't think it was necessary.

Q Do you still hold to the opinion that you don't think it was necessary?

A Yes, sir.

Q Even though over almost half of the jurors were -- or a third of the jurors on the panel were excused because of cause?

A I thought that if venue was going to be changed, that would be the reason to change it.

Q Okay. But you took no independent investigation as to the feelings in the community prior to the trial?

A I knew what they were.

Q What were those opinions?

A About the same as it was in Sebastian County.

Q And yet those opinions that prevailed in Sebastian County were -- and there was a record in the first trial upon which the Supreme Court reversed the conviction in the first trial;

is that not correct?
A I'm sorry. I -- I didn't follow your question.
Q In the first trial, there was a record -- there had been a motion for a change of venue; is that correct?
A Yes, sir.
Q And based upon that record that was in the first trial, the Supreme Court of Arkansas reversed the conviction; is that not correct?
A Yes, sir.
Q But in the second trial with the same type of community feeling against the defendant, there was no record, was there?
A I thought the record was made when we voir dired the jury.
Q But there had not been a motion filed?
A That's correct.
Q Were you acquainted with any other attorneys in Waldron at the time of the second trial?
A I'm not sure whether there were any there or not. There may have been but I'm not -- I don't remember.
Q Did you talk with any of the courthouse personnel, the clerk, the sheriff, concerning what the feeling in the community was against John Swindler?
A Yes, sir.
Q What would these officials -- who did you talk to, first of all?

A I think I talked to the Clerk and the Sheriff, or there may have been some other county officials. I can't recall right now.
Q Do you recall what their comments were with reference to the feeling against John Swindler in Scott County?
A About the same as it was in Sebastian County.
Q And what was that opinion in Sebastian County, Judge?
A Well, it was strongly unfavorable to Mr. Swindler.
Q During the trial of the case, Judge, or during the voir dire proceedings, was there ever an admonition made to the veniremen not to discuss the case or read about it?
A I don't know.
Q Did you ever request such an admonition by the trial court?
A I don't recall.
Q After the first case, the trial of the first case, you pretty much knew what to expect upon the second trial of the case; is that correct?
A I think it was pretty well a re-run of the first one.
Q All right. In the first case, did you put on any mitigating circumstances for -- to mitigate against the aggravating circumstances that the State put on, when you questioned in the penalty portion of the trial?
A I don't recall.
Q I take it in the investigation of the case, you had many

conferences with John Swindler?

A I think about all the conferences we had with him was, was just to prepare him for his own testimony.

Q All right. Did you ever discuss with him his previous incarceration in various institutions?

A Well, it seems to me like about all we talked about probably was Leavenworth. I'm not sure whether we ever talked about any State penitentiary or not.

Q Do you recall whether or not you ever discussed with him any psychological examinations of him?

A I don't recall that.

Q Now is it not true that prior to the first case, he was examined by the officials at the State Hospital here in Little Rock?

A Yes.

Q And those officials found him -- or the report from those officials indicated that he was competent to stand trial?

A Yes, sir.

Q Did you ever had any discussions with them concerning any mental problems that he might have which might be offered in mitigation?

A I think what I did was I got the complete file from the State hospital. I believe I did, and -- but I'm not sure whether -- I may have conversed with some down here or I may not have. I don't recall, but I think I did get the nurses

notes and all that from the State Hospital and all the reports before they staff them and all of those things, but if I didn't it would surprise me, but I think I did.

Q Do you recall ever have conversations with the psychiatrist or psychologist who examined John Swindler?

A I don't have any independent recollection of it now.

Q In any event, none of those officials or persons were called in support of any mitigating circumstances, were they, in either the first of the second trial?

A I think that my basis on that was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful. That's my recall now.

Q Do you recall -- now in John Swindler's testimony in the second trial, he has -- a portion of his testimony went to his mental problems that he had had in his youth up to the time that he had been arrested, falling off the bridge, being knocked unconscious for two or three days, those type of things, and he testified to those in the main portion of the trial; is that correct?

A I guess he did, if you're telling me he did. I really -- seems to me like all I have read of this transcript is, is the penalty phase of it, and I do allude to that, to some of that in my closing argument, so I assume that he did testify to some of his background information.

Q Now you had talked with John concerning these instances

in his past; is that correct?
A I don't know how else I could have found out about them if I hadn't have really.
Q Did you take any other steps to investigate these things that he had informed you about, about his past?
A We got some information from South Carolina, but I'm not sure whether it was concerning any of his mental status or not.
Q Did you ever request from any of the Federal or State institutions in which he had been in in the past any psychological or medical records?
A Not that I'm aware of.
Q Did you talk with any of his -- the members of his family concerning his health or his mental problems that he may have had in the past?
A I don't think so.
Q And the only evidence in mitigation was John's own testimony concerning his injuries; is that correct, that he had had in the past?
A The only thing I think we alluded to during -- I'm going by what we argued in closing argument, I guess, was what was brought out during the testimony during the case in chief --
Q Yes, sir.
A -- and that would have been his testimony and any other testimony we could have had that would have been during the

particular points in the trial.
Q Judge, did he not use in that testimony the term "paranoia," that officials had found him to be paranoid?
A All I can go by is, is I think I referred to that in my closing argument, so I assume that he did.
Q But you took -- other than that statement from John Swindler, you took no other steps to investigate the nature and extent of this paranoia?
A I read the State Hospital reports. They didn't find anything like that.
Q The State Hospital Report was primarily -- the direction of the State Hospital Report was to find whether or not John Swindler was competent to stand trial or competent at the time he committed the offense; is that correct?
A Yes, sir. I think they're supposed to advise if there's any other problem such as a personality disorder or anything like that.
Q And do you recall talking with any of the physicians who examined him or the psychologist whether or not there were any type of personality disorders?
A I would just have to refer you to the report they filed with the Court and also the reports that they sent us under subpoena.
Q You did have -- you did subpoena the records then?
A That's the only way you can get them out of the State

Hospital.

Q But you do not have any independent recollection what those reports contain?

A I hope I don't have this case mixed up with another one, but I thought that everything in it was more damaging that it was helpful the best I recall. I thought that the State could beat us to death with these and we would be worse off using it as we were trying to use it.

Q In the second case when it was appealed to the Supreme Court, you also handled that appeal to the Supreme Court; is that correct?

A Yes, sir.

Q The Supreme Court indicated that you argued the same issue of pretrial publicity and prejudice in the community that had been argued in the first case, but the Supreme Court said that there was no evidence in the record to support that argument; is that not correct?

A I don't recall it.

Q Judge, I'd hand you a copy of the Southwestern Reporter of this case and marked there -- does that not indicate that the record in that case did not contain --

A Oh, they're -- they're talking about no -- none other than the voir dire of the jury. I assume that's what they're talking about. I thought that there was plenty of evidence in the record myself, but that's their opinion.

Q Did the trial between the mandate coming from the second or the first case of the Supreme Court, the time between the trials and the mandate coming down from the Supreme Court was sufficiently long that you could have if you had wanted to, to examine the prejudices in Waldron and Scott County?

A I had plenty of time.

Q And you knew the procedure on filing for a change of venue, did you not?

A I didn't think it was necessary. Still don't.

Q But you did argue in your brief to the Supreme Court in the second case that there was pretrial publicity to such an extent in Scott County that it was impossible to get a jury who would not be biased against the defendant?

A I based that on the voir dire of the jury.

Q Prior to the trial of the case, you had also had information which -- from the officials in the County that the same type of prejudice that existed in Sebastian County also existed in Sebastian County? (Sic)

A I'm not sure that I had it that soon. I think I probably only learned of that while we were going down there is the best I recall. I don't think you have to have any solid evidence. I think you can just go by what the talk is.

Q And you did not take any steps to find out what the talk was prior to you drove down to Waldron for the trial?

A I knew what the talk was.

Q And the basis of that knowledge is what, sir?
A Just talk.
Q Now that was -- you were living and practicing law in Sebastian County at that time; is that correct?
A Yes, sir.
Q I'm talking about in Scott County.
A I see people from Scott County from time to time.
Q So you were familiar with Scott County and the people who live there and had a pretty good feel of what their opinion would be, I take it then?
A I don't know whether it's that solid, sir. It's -- these things are developing. It just -- it just comes to you. I don't think it would take anybody with more than average intelligence to know what was going on.
Q Now you argued that in your brief to the Supreme Court that Scott County was -- the media in Scott County comes primarily from Fort Smith; is that correct?
A Yes, I think they do have cable out of Little Rock, but I'm not sure. I think they do.
Q But primarily they --
A I think the daily newspaper is basically from Fort Smith. There's three television stations in Fort Smith. I believe the radio, most of the radio carries down to there. They may have their own local radio station but I'm not sure.
Q The Judge said, I believe, that there had been a great

down there. I could have just drove down there and talked to anybody I wanted to talk to if I had've felt it was necessary.
Q Okay. My only other question at this point would be do you have anything else you would like to add to any of the questions that have been posed here to you? Do you have any other thoughts that occurred to you at this point that you'd like to inform the Court of?
A No, sir.
MR. GILLEAN: Your Honor, for purposes of cross examination, I think that's all I have of this witness.
MR. RAGAR: Just a small amount of redirect, Your Honor.
THE COURT: All right.

REDIRECT EXAMINATION

BY MR. RAGAR:
Q On direct examination, you indicated that you knew what the evidence was going to be in the second trial pretty much only as a rehash of the first trial. I take it that you had a -- as a trial lawyer who was experienced -- a pretty good gut feeling about what the outcome would be on the second trial as far as the guilt or innocence was concerned?
A Well, we hoped to get the charge reduced at least to, you know, first degree murder, or hoped to maybe get it down to second degree, but we felt that we might have a chance on like first degree or something like that because it all happened on

an incident out there at the service station, and that was basically our theory was to try to use some sort of a justification that it was a gun battle type of situation and not a premeditated type of situation so that we could get it down to some lesser degree but we were not successful at either trial.

It was probably a remote hope on our part, but I think a lot of defense attorneys have -- all they have on lots of cases is just remote hope.

Q Judge, when you went to trial the second time you had a pretty good idea, though, that the same -- as far as the penalty would be, the State had not indicated that they were going to go for a lesser charge or anything like that. They were still going for capital murder --

A Oh, yes.

Q -- and seeking the death penalty?

A Oh, yes.

Q That there was a high likelihood that the death penalty would be imposed also?

A Well, whenever you try a capital case, the death penalty is always what you're staring at, so I don't have any reason to dispute what you said.

Q And between the second and -- first and second trial, you did not take any steps to develop any mitigating evidence, did you?

A Just the Don Reed testimony was all that I tried to develop.

Q Mr. Reed's testimony was -- went to the nature of death by electrocution, did it not?

A I'll tell you, I was going to try to develop it further than what it had been developed in Georgia, but I just can't recall exactly what all we were going to go into. We talked four or five times, I guess, about what his testimony would be, and I told him that I definitely wanted to develop it further than what I had in that little transcript I had, but to tell you right now what we were going to talk about other than the death penalty I can't recall. I was going to more or less go into more detail about how gruesome it was, I think.

Q Mr. Reed's proferred testimony would not have gone to John Swindler as a defendant, though, would it?

A I don't recall whether it would or --

Q It was not unique to his situation. It would apply to any person facing the death penalty, I take it?

A I would assume that's correct.

Q Now you indicated on your direct examination that you were of the opinion that as far as the pretrial publicity that you would be able to show that in Scott County there was prejudice similar to the prejudice that had been exhibited in Sebastian County at the first trial, and that through the voir dire you would be able to show that the Arkansas statute on

change of venue was unconstitutional.
A Not the statute, our constitution.
Q The constitution --
A Of Arkansas.
Q -- of Arkansas that prohibits just one --
A Right.
Q All right. Unconstitutional against the Federal Constitution, I take it?
A Yes.
Q In trying to show that that provision of the constitution was unconstitutional, would you not have had to first comply with the provisions of the Arkansas statute before you can raise the issue of the unconstitutionality of the constitutional provision?
A That wasn't my opinion.
Q I take it that given the feeling in Scott County you could have if you had wanted to obtained affidavits from citizens of Scott County stating the prejudice that was against John Swindler in Scott County?
A That would be speculation on my part, but I don't think that there would have been any -- I know that you could have probably gotten people to say, "Well, there's been lots of pretrial publicity down here and he probably can't get a fair trial." Now whether they would have signed an affidavit or not, that would have been up to the powers of persuasion of

the one talking to them.
Q You did not have too much trouble in getting those affidavits in Sebastian County, though, did you?
A Well, we --
Q In the first trial?
A Everything is trouble, but we got some.
Q But in the second instance you didn't even try to get any affidavits, then?
A No, sir.
MR. RAGAR: That's all.
THE COURT: Any recross?
MR. RAGAR: Judge, let me confer with --
THE COURT: All right.
BY MR. RAGAR:
Q Judge, during the first day and a half at the trial, there had not been any jurors seated, had there?
A I know we didn't get any the first day. I don't know when we got the first juror.
Q And the first jurors were seated after the procedure that you outlined on cross examination. The regular procedure was changed and the prosecution began asking questions; is that correct?
A I'm not sure whether he started that on the first day or the second day. I think he saw that it would -- that him trying to bolster them before he let them get to me was

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER, PETITIONER	)	
VS.	)	No _____
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT	)	

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX VII
Voir Dire of Veniremen
Thomas Bricksey
Henry Sunderman
Thuman Jones

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

55 pp

that were asked of you or the answers that you gave. What we are trying to do, and I hope you will all understand this, is try to make a jury based upon the individual opinion and knowledge of each individual juror. So the Court must request that after you are examined that you do not discuss what your examination consisted of while you were here. We are going to move along in just a few moments, and we will try to move along as rapidly as we can. So thank you very much, and I felt it was necessary to tell you that since I had overlooked it before. All right, let's call the first juror, please.

VOIR DIRE EXAMINATION OF HENRY SUNDERMAN

BY MR. LARR:

Q. Mr. Sunderman, do you know anything at all about the facts of this case?

A. Only what I have read in the newspaper and TV.

Q. Have you read quite a bit and seen quite a bit on TV about it?

A. Some little bit, yes.

Q. From what you have read and seen, do you have any opinion as to how the case should be decided?

A. No, I don't.

Q. Have you ever served on a jury before?

A. Yes.

Q. When was that?

A. This would be approximately, oh, 1972.

Q. Was that here in Scott County?

A. No, it was in Polk County.

Q. What kind of jury did you serve on? Was it on a criminal case?

A. It had to do with DWI, I believe.

Q. Do you recall what the jury verdict was in the case?

A. It was a hung jury.

Q. Where do you work?

A. For SWEPCO here in Waldron.

Q. How long have you worked for them?

A. For sixteen years.

Q. How long have you lived in Scott County?

A. Since January of 1974.

Q. Do you know whether you or any member of your family has ever been a party to a lawsuit, either criminal or civil, or have you ever been a witness in any lawsuit?

A. No.

Q. In a criminal case of this type the State of Arkansas has the burden of proof to prove a defendant guilty beyond a reasonable doubt. And that is a burden that we, representing the State of Arkansas, accept, and the defendant does not have any burden at all. He does not have to prove to the jury that he is not guilty, or he does not have to prove or disprove anything that we prove. If you were selected on the jury can you accept that fact, or would you want to require the defendant to prove his innocence?

A. I would make my decision based upon the facts.

Q. Okay, on the facts that we as the State of Arkansas put on?

A. Yes.

Q. You would not require the defendant to put on any evidence to prove that he was innocent?

A. No.

Q. You would leave the entire burden with the State of Arkansas where it is by law, is it?

A. Yes.

Q. Do you believe in the death penalty?

A. Yes.

Q. Do you think that execution is a way out down on crime to keep some people from committing crimes that would otherwise?

A. I feel that it is a deterrent, yes.

Q. And from having served on the case involving, Dr. or something, you know that under the law of Arkansas the jury not only determines guilt or innocence of the defendant, but the jury also fixes punishment; that is not left up to the Judge. Do you realize that?

A. Yes, I do.

Q. If you were selected on this jury and you served, at the end of the trial after hearing all of the evidence, and after hearing the law that the Judge gives you, if you found this and a proper case for the death penalty under Arkansas law, could you and would you vote to impose that penalty?

A. Yes, I would.

Q. Do you know of any reason why you could not serve on this trial and give a fair trial to both the State and the defendant?

A. No, I do not.

MR. KARR: That's all

BY MR. SMITH:

Q. Mr. Sunderman, how old are you?

A. Forty-one.

Q. Are you married, sir?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many children do you have?

A. Two.

Q. How old are they?

A. One age nine, and one age fourteen.

Q. A boy or girl?

A. The boy is nine, and the girl is fourteen.

Q. I believe you stated that you read or heard a little bit from the media on this case.

A. Yes, I have.

Q. Would you mind telling me what you had heard, what you remember?

A. Well, I remember that the altercation that took place, to the best of my recollection, was at a service station, and of course I remember the names that were mentioned, and the TV and news accounts of this.

Q. Okay, what names were mentioned?

A. The names that I remember being mentioned were Randy Bassett and Mr. Swindler.

Q. All right, now did you watch the television?

A. Yes, I did.

Q. Okay, now you were living here in Scott County at that time?

A. Yes, I was.

Q. Now, do you live in town?

A. Yes, I do.

Q. Do you get the cable?

A. Yes.

Q. Which station were you watching on that?

A. To the best of my recollection, Channel 5.

Q. Okay, how long do you feel you watched those reports?

A. Well, as a general rule, I usually watch Channel 5 news every day.

Q. Did you read the newspaper accounts?

A. I wouldn't say that I read them every day, but I usually look through the paper. I don't read a newspaper, I would say, as closely as I watch TV. So I wouldn't say that I read the news accounts of it every day, but I did watch TV every day.

Q. All right, did you remember anything about the defendant's background, where he came from, or anything like that?

A. Yes, I guess I do.

Q. All right, would you tell me what you remember, please?

A. To the best of my recollection, I made her that he, Mr. Gaudier was from North or South Carolina. I remember that there were prior charges, to the best of my recollection, that had been brought against him in that state.

Q. Do you remember what those charges were?

A. Really I don't. It seems to me, to the best of my recollection, it was some sort of assault charges.

Q. You don't know anything more about it than that?

A. Not to my recollection. I don't remember anything other than that.

Q. Okay, did you talk to anyone about this case at that time?

A. Yes, to the best of my recollection, I think, you know, it was discussed, yes.

Q. Did anyone express an opinion to you about the case?

A. Yes.

Q. What did they say?

A. The ones that discussed it with me, particularly, I would say, you know, after the trial that they were convinced.

Q. All right, now at this time that happened did you discuss it with anyone?

A. Well, there again, to the best of my recollection,

it was discussed, and I don't remember any of the details of the discussion, but I think it would be like any other news item, that it was talked about.

Q. All right, now did people, again did people state opinions to you that at that time, at first?

A. To the best of my recollection, yes, they did.

Q. Do you remember what those opinions were?

A. The majority of them were that they felt that he was guilty.

Q. Did anyone state to you that their opinion was that he was not guilty?

A. Not to my recollection.

Q. All right, did you ever express an opinion to these people when you were discussing the case with them?

A. To the best of my recollection, I would say that I probably did, yes.

Q. All right, what do you recall that opinion to be?

A. At that particular time I feel that I was of the opinion that he was guilty.

Q. All right, is that your opinion at this time?

A. I did not hear all of the evidence at that time, and based on what I did hear at that particular time I had an opinion at that time; at this time I would have my opinion on the evidence that was

presented.

Q. All right, now did you follow the reports of the case when it was first tried?

A. Oh, well, to some degree, yes.

Q. Did you feel that the findings of that jury had some relevance?

A. Well, I feel like that any jury that hears the evidence that is presented to them, I feel like, you know, twelve people come to the same conclusion, that I feel like, you know, they have made a decision based on what the facts that they were aware of.

Q. Well, what I am asking you is, do you feel like because they came to that conclusion that the defendant may well be guilty?

A. I would say yes.

Q. You would say that?

A. Yes.

Q. All right, that is an opinion that you have?

A. I have the opinion that the twelve, based on the facts that were presented to them, made a decision based on those facts, yes.

Q. All right, now then if you were selected for the jury would you require the defendant to present evidence to set aside that opinion?

A. Well, as I said before, I had my opinion at that

time, and I feel like if I sit on any jury it would be my duty to make my decision at that time, based on the facts that were presented to me, not what had been presented somewhere else.

Q. All right, in other words you are saying that you would only consider what was being presented to you?

A. Yes.

Q. You would not be considering what another jury had considered, what their verdict was, or anything like that?

A. No.

Q. Now, of course, you stated that you had read these reports, at one time you did form an opinion?

A. Yes, I did.

Q. All right, now if you were selected to the jury do you feel as you were listening to the evidence that that prior opinion would prevent you from, oh, weighing the evidence? Do you think it would get in the way of your deliberations?

A. Well, I would hope not. Now, like I say, I think I cannot tell you that a thought would not cross my mind.

Q. All right, now if that thought did cross your mind

would you report that to the Court that you could not keep the prior opinion out of the way of your deliberations?

A. I think that would be my duty, yes.

Q. Okay, do you feel that you might compare whatever evidence was presented in court to whatever you heard from the media?

A. I would do my best not to.

Q. But do you believe you would be able to not compare the evidence?

A. I don't think I could tell you without a shadow of a doubt that I would not.

Q. What I am asking you is, do you feel you could just listen to the evidence as presented in court and not consider the other evidence?

A. To the best of my recollection, I don't recollect what the evidence was.

Q. Well, the reports or anything like that?

A. Well, you mean if I was asked the question if I were presented reports that were made by the police?

Q. No, sir, what I am referring to, I think, is that if you were selected for the jury, testimony presented by the witnesses, would you be able to just consider that testimony, that evidence presented in this courtroom and not allow any other notion or opinions that you might have had before-

hold us to our burden of proving his guilt beyond a reasonable doubt?

A. Well, sure.

Q. On the other side of the coin, you would not require him to prove that he is innocent?

A. Well, I think you know, you would have to base it on facts either way you went.

Q. Right, you would have to base your decision on the evidence that is presented in court. What I am asking about is this burden of proof thing. You would require us as the State of Arkansas to prove him guilty, and on the other side of the coing, you would not require him to prove that he is innocent? The entire burden is on the State in this case.

A. Well, he would have to prove he is innocent if you saw him innocent. I mean, if that answers your question.

Q. Well, if the State does not prove him guilty then he would be in his natural right. But he would not have to prove he was innocent, it would be us failing to meet our burden of proof. So I am just asking you, would you require us as

the State of Arkansas to prove him guilty and not require him to prove that he is innocent?

A. Well, I think you would have to prove he was guilty.

THE COURT: Let me see if I can help without interjecting too much. Under the law that you will be instructed about if you are a member of the jury, as Mr. Karr has said the burden of proof is entirely upon the State of Arkansas to prove the guilty of any defendant beyond a reasonable doubt. You fully understand that?

A. Yes.

THE COURT: Under the law any defendant in a proceeding of this nature is presumed under the law to be innocent. Do you understand that?

A. Yes.

THE COURT: All right, now under the law, then, and this is the law, and I am going to ask you if you can accept it and follow it; under the law then the defendant would be under no burden to prove his innocence, since the burden is upon the State to prove his guilt. Do you understand that?

A. Yeah, you are right.

THE COURT: All right, therefore he is under no duty to put on any evidence to establish his innocence or to refute his guilt, as he wishes. And that is the law, in cases of this nature. Now, if you should be selected to serve on the jury could you and would you require the State of Arkansas to prove him guilty beyond a reasonable doubt before you would convict him?

A. That's right; yeah, you would have to do that.

THE COURT: All right, and the Court is telling you under the law he is presumed to be innocence, and he is under no duty to offer any evidence in his behalf, and can you accept that as being the law?

A. Uh huh.

THE COURT: You would not hold it against him if he should elect not to put on any evidence, but base your verdict

solely upon whether or not the State has proved his guilt to your satisfaction beyond a reasonable doubt?

A. Yeah, I would have to go by that.

THE COURT: You can accept those principles of law, and will follow them if you are selected on the jury?

A. That's right.

THE COURT: All right, Mr. Karr, go ahead and continue. I thought I might help.

BY MR. KARR:

Q. Is there anything about serving on this case if selected on the jury that would cause any particular hardship for you, that would keep you from devoting the attention to it that it deserves?

A. Not that I know of.

Q. Do you know of any reason why, if you were selected to sit on this jury, you could not give a fair trial to both the State of Arkansas and the defendant?

A. No, sir.

MR. KARR: That's all.

BY MR. SETTLE:

Q. All right, now Mr. Staggs, I believe you stated you heard a few of the reports and the accounts in the media, television. Didn't you tell Mr. Karr

that you had heard a little bit about this case?

A. Right, sir.

Q. Let me just ask you this. Do you recall those accounts, do you recall what was reported?

A. Well, I just saw some of the skits on TV. I read the newspaper.

Q. Which newspaper was that?

A. The Fort Smith Times R cord.

Q. Do you get the Fort Smith paper?

A. Yes, sir.

Q. Do you live in town?

A. Uh huh.

Q. Are you on cable?

A. No, sir.

Q. You just get Channel 5?

A. Yes.

Q. Did you follow these accounts very closely?

A. No, sir, because I worked evening and nights a lot and I don't catch it all.

Q. Would you tell me what you remember?

A. Well, I couldn't really right off, more than than just, you know, it come in on the news about this incident that happened.

Q. Just go ahead and tell me what you know.

A. Well, I couldn't say I could tell you all I knew, but I do remember, you know, just when it come

in on the news about a policeman getting shot, and really I didn't keep up with a lot about the trial situation. I did some, but I couldn't offhand tell you. That's all I did.

Q. All right, do you remember anything else except a policeman being shot?

A. Well, I kept up, you know, and saw they caught a person.

Q. They caught the person?

A. Well, they got him.

Q. Well, which person was that?

A. Well, the person they said did it.

Q. Which person was that?

A. That was Swindler.

Q. You mean the defendant?

A. Uh huh.

Q. All right, did you discuss this case with anybody?

A. Oh, I probably did.some with my wife.

Q. Did other people discuss it with you? Besides your wife?

A. Oh, I wouldn't say I didn't some, but not a lot.

Q. Did anyone express an opinion to you about this case, about how it should be decided?

A. No.

Q. You don't recall anybody saying that they thought he was guilty, or anything?

A. Well, I don't believe, I don't believe I heard anyone just come out and say they believed it.

Q. Did anyone ever express an opinion to you that he was not guilty?

A. No.

Q. Did you ever express your opinion to anyone else?

A. No, I really didn't.

Q. Okay, did you get any information on where the defendant came from, where he had been before, or anything like that?

A. No. I did hear about another incident or two, someone was telling me, but I don't remember where it was at.

Q. All right, why don't you go ahead and tell me about that?

A. Well, I just heard there was two more people that had been killed by him.

Q. Had been killed by him?

A. That's true.

Q. Did someone tell you about that?

A. I don't believe I read it, I believe someone did. I don't know whether they was talking directly to me, or just some people in a conversation was

had, but I do remember vaguely.

Q. All right, based on that, have you formed an opinion in this case?

A. Well, I would just have to form it on what you heard, I mean, you know, you hear these things. I won't say that I said it either way, because something like that you see on the news. I guess if I would say the way I saw it, probably most of the time you think well, it happened, or, you know, they wouldn't be putting it out. But just as far as really coming down and saying you knew it did, you couldn't say that.

Q. But did you have an opinion about this case, based on what you had heard?

A. I don't know, you might call it an opinion. You hear these things and, well, we have to - what's going on, you don't believe it is all false; you believe there are some facts about it.

Q. All right, I guess I am going to have to ask you to try to respond to my question the best you can, because I think you might be having a little difficulty with it. I am asking whether based on all you've heard, and all the discussions or whatever, after that if you formed an opinion, whether you knew anything about it or not, have

you ever talked to anybody about this that said they had first-hand knowledge about the incident?

A. No, sir.

Q. I am just asking you then, based on what you heard did you form an opinion about this case as to the defendant's guilt or innocence?

A. Well, I would have to say based on what I have heard, and the belief of the people, I would have to have a little bit of an opinion.

Q. What would that opinion be?

A. Well, it would have to be like it came out.

Q. Do you have that opinion at this time?

A. Yes, I guess you would say, to an extent. Not that I couldn't change it if it was different, but I still believe, you know, you would have to have some confidence in the people.

Q. Is that a fixed opinion, you feel you would have difficulty getting rid of that opinion?

A. No, I can accept facts.

Q. All right, and would you require the defendant's side of the case to put on evidence, or some sort of evidence to change that opinion that you have?

A. Would you repeat that?

Q. I am asking you, would you require something from

the defendant's side of the case before you would change the opinion that you have?

A. No. If I was on the jury I could listen, you know, to the trial; and if there was a difference, I wouldn't pay any attention to my opinion because if I listen to that I will listen to the facts that are brought out.

Q. All right, now if you were selected for the jury do you believe that you would be able to listen to the evidence and just not consider anything else you may have heard?

A. Right, that's the only way I would listen.

Q. Do you believe that you would be able to avoid comparing what you had heard with whatever you had heard prior to coming into court? In other words, just consider what you heard in court?

A. Right.

Q. You would not compare the State's evidence, or whatever the evidence might be with what had been reported?

A. I would only want to hear what went on at the present.

Q. Now, if you felt that the opinion was making it

difficult for you while you were deliberating on the case, after the case was presented to you, and you felt you were having difficulties getting rid of your opinion, or your opinion was conflicting with what the evidence had been, do you feel you could report that to the Court, the Judge?

A. I wouldn't serve on it if I couldn't drop my opinion; I wouldn't go with a thought either way.

Q. All right, now in this case I anticipate that the State will call as witnesses some police officers. Now, would you be giving their testimony any greater weight than private citizens' testimony?

A. No.

Q. You would just consider their testimony on an equal basis of another person's testimony?

A. Right, I would have to be fair.

Q. Do you know any police officers, sir?

A. Just local here.

Q. Are you related to any?

A. No, sir.

Q. Have you ever discussed this case with anybody or any police officers that have ever expressed an opinion to you about it?

A. No.

Q. Do you feel like if you were a member of the jury

and owe, whether the jury brought back a guilty or not guilty verdict you would owe any explanation to any officer?

A. No, sir.

Q. All right, now it may come in the testimony that is presented in court that the Court may decide that it is appropriate to instruct the jury on what we call lesser included offenses. Now, this would be in the homicide area. The most serious offense is capital felony murder. That is what the defendant is accused of. The next most is first degree murder, and then there is second degree murder, and manslaughter. Of course, it would depend on what the Court would feel appropriate. Now, as the Court has decided to instruct the jury on these lesser offenses, could you as a juror consider these lesser offenses?

A. Certainly.

Q. Now, I know Mr. Karr discussed the procedure. Now, just assume for the purpose of this question, it is hypothetical, that if you were selected as a juror that you as a member of the jury, and the jury in all, decided to vote the defendant guilty. Now, that is the first step. The second step, of course, is to decide on the punishment. Now, there

are two possible penalties. First if life without parole, and the second is the death penalty. Now, do you feel that if the evidence were presented to you, and you got to this point, that you could consider the life without parole as an alternative, or do you feel you could consider it equally with the other penalty?

A. Right.

Q. You wouldn't weigh one over the other?

A. Not based on the facts, it would be the best of my knowledge.

Q. You would require the State to prove its case beoynd a reasonable doubt?

A. Right.

Q. Okay, now, Mr. Staggs, referring back to the penalty stage, now if you were considering on the penalty to be imposed do you believe that you could set aside anything you may have heard and consider only what was presented in court?

A. Right.

Q. You could set aside whatever someone else told you about the defendant's background and just consider what's here?

A. Yes, to the best of my knouledge, what I gathered here.

Q. Let me just ask you a couple of general questions. How long have you lived in Scott County?

A. All my life, more or less.

Q. What sort of work do you do?

A. I work for Val-Mac Industries in poultry.

Q. How long have you worked there?

A. Seventeen years.

Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Four.

Q. How old are they?

A. About 22, 20, 16 and 13.

Q. How old are you, sir?

A. Forty-nine.

Q. Do you feel you can give the State of Arkansas and the defendant a fair trial in this case?

A. Yes, sir.

MR. SETTLE: Pass the juror.

MR. KARR: Mr. Staggs is good for the State.

MR. SETTLE: Your Honor, I will submit this man for cause. He has an opinion, and I believe he should be disqualified.

THE COURT: You will be overruled.

MR. SETTLE: Note my exceptions.

Your Honor, this juror is good.

THE COURT: All right, Mr. Staggs, you have been now selected for the jury and we are still in progress, of course, in making our jury and what our plans are is to, we do not intent to start the testimony in the case until Monday morning. So I am going to excuse you. The attorneys have agreed that in order to keep the jurors from waiting around that they may be excused until the testimony starts. There is always the possibility that we cannot even start Monday, but that is what we are aiming toward. So I am sure you fully realize the great importance of the fact that since you are a member of this jury that certainly you should not permit any person under any circumstances whatever to try to discuss this case to you, express any opinion to you, or anything

think that knowing that those are two alternatives and that under the evidence you could vote for either one of them after you find him guilty, do you think you could still consider it and find him guilty, knowing that those are the two possible punishments?

A. I could not if I knew the man was going to be put to death, I would not; I am just against the death penalty, because it is something that is final, it cannot be revoked.

Q. Are you telling us that you don't think that you can consider the death sentence in this particular case under any circumstances?

A. No, I could not. I do not believe in capital punishment.

MR. LANGSTON: I believe that is all the questions I have.

THE COURT: All right, the Court will excuse you.

MR. LANGSTON: Save my exceptions, Your Honor.

VOIR DIRE EXAMINATION OF THOMAS BRICKSEY

BY MR. KARR:

Q. Mr. Brickeey, do you know anything about the facts of this case?

A. Oh, yes.

Q. Where did you get your information?

A. Newspapers, television, radio.

Q. Have you followed it fairly closely since it happened back in 1976?

A. Yes, sir, you can't avoid it.

Q. Based upon what you have seen, heard and read have you formed an opinion now as to how this matter should be decided?

A. Yes, sir, I think so.

Q. Is that opinion so fixed in your mind that you could not set it aside and if you were selected on the jury to just base your decision on what happens in this courtroom?

A. Do you mean could I be impartial, yes, I could.

Q. All right, you understand it is natural for someone to form an opinion when they read about something like this based on what they read and hear. And there is nothing wrong with that at all. But if that opinion becomes so fixed in your mind that you could not set it aside and disregard it if you were selected on this jury, then you probably could not serve. But if the opinion is not so fixed that you could lay it aside, and then come into the courtroom and just base your decision on what happens in court, then you would be an acceptable juror. And do you think

that is your situation, that you could set aside your opinion and listen to the evidence and the instructions from the Judge, and the base your decision just on what happens here?

A. Yes, sir, I probably could.

Q. Where do you work, Mr. Brickzey?

A. I am self-employed, mainly as a house-painter.

Q. How old are you?

A. Forty.

Q. Are you married?

A. Yes, sir.

Q. Do you have children?

A. Yes, sir.

Q. How many?

A. Two.

Q. What kind?

A. Two girls.

Q. Their ages?

A. Fifteen and sixteen.

Q. Do you believe in the death penalty?

A. Yes, sir.

Q. Do you believe it is proper punishment for some crimes?

A. Yes, sir.

Q. Under Arkansas law the jury not only determines

not only whether the defendant is guilty or innocent, but the jury also fixes the punishment when they convict someone. And do you understand that; that is not left up to the Judge in our system?

A. Yes, sir.

Q. And in a trial like this where the defendant is charged with capital murder there are two possible penalties, one is death and the other is life imprisonment. But it is not up to the jury to just select one or the other as they choose, but we have a two-stage trial. It is really like two trials in one, and the first part of it is only concerned with the guilt or innocence of the defendant. Now if the jury finds the defendant guilty beyond a reasonable doubt, then we come back into court and we go into the second part of the trial, and that is the part where we get down to the penalty. And then when we get into that phase of the trial we present evidence about aggravating circumstances and mitigating circumstances. And the aggravating circumstances are things that make this case more serious than another one

just like it. And mitigating circumstances are things that make this case less serious than another one just like it. And then the jury balances the two of those, and if they find that the aggravating circumstances outweigh the mitigating circumstances then that is a proper case for the death penalty. Now if you were on this jury and you made that finding, could you and would you vote to impose the death penalty?

A. Yes, sir.

Q. You understand that each of the twelve jurors it has to be their verdict, and they have to sign the verdict, and come back into open court and announce that as their verdict?

A. Yes, sir.

Q. Under our law a defendant is presumed innocent until they are proven guilty beyond a reasonable doubt in court. Now, do you accept that legal principle as a basic part of our judicial system?

A. Yes, sir.

Q. Can you give that presumption of innocence to this defendant in this case? Do you know of any reason why you cannot?

A. No, sir.

Q. Just as a legal matter, he is presumed to be innocent right now, and you accept that?

A. Yes.

Q. Now, we as the State of Arkansas have the burden of proving a defendant guilty beyond a reasonable doubt in court. And converse to that, the defendant does not have any burden at all. He does not have to prove his innocence; he does not have to disprove anything that we prove about him. Do you know of any reason why you could not hold us, the State of Arkansas, to our burden of proving him guilty beyond a reasonable doubt?

A. No

Q. You understand that he does not have to offer any evidence to prove that he is innocent, and if he does not offer any evidence you cannot hold that against him, but you would require us to prove him guilty?

A. Yes, sir, I understand that.

Q. Do you know of any reason why you could not sit on this jury and give a fair trial both to the State of Arkansas and the defendant?

A. No, sir.

MR. KARR: That's all.

BY MR. SETTLE:

Q. Mr. Brickney, am I pronouncing your name correct?

A. Yes, sir.

Q. How long have you lived in Scott County?

A. All my life other than military service.

Q. All right, which service were you in?

A. The Air Force.

Q. Do you work here in Scott County?

A. Yes, sir.

Q. What sort of work do you do?

A. Oh, mainly painting, repairs.

Q. Do you get the cable television?

A. No, sir.

Q. What stations do you receive?

A. 2, 6, 5 and 8, and educational channel, too.

Q. Now, where are 2 and 6 from?

A. Tulsa.

Q. Both of them from Tulsa?

A. Yes.

Q. Okay, do you get the Fort Smith paper?

A. No, sir.

Q. Do you get the local paper?

A. Yes, sir.

Q. Do you occasionally read the Fort Smith paper?

A. Oh, yes.

Q. About every day, or just occasionally, or what?

A. On the average of once a week.

Q. All right, now I believe when Mr. Karr was questioning you he asked you some questions about whether you knew anything about the case, and you indicated that you did know something about it, and that you heard some of the accounts. Can you tell me what you remember from these accounts?

A. All of it?

Q. Yes, sir.

A. Well, I remember when the case first started, when Mr. Basnett was killed, and about the subsequent events inasmuch as the defendant abandoned his vehicle, and ran away from the scene, and things that occurred after that. Also, about the first trial.

Q. All right, you remember what the verdict was at the first trial?

A. Oh, yes.

Q. You read about that?

A. Yes, sir.

Q. Well, what happened in the first trial, would that have any affect as to what was happening here?

A. Well, I am sure it would, but the question was could I render an impartial verdict, which I

think I could under the circumstances.

Q. All right, have you discussed this case with anybody?

A. Oh, yes, sir.

Q. All right, and have these people expressed an opinion to you about this case?

A. Yes, sir.

Q. Could you tell me what those opinions were? Did they think the defendant was guilty?

A. I am afraid it was almost unanimous.

Q. Did you ever hear anybody state tht they thought he was not guilty?

A. No, sir.

Q. All right, now out of all this I believe you told Mr. Kerr that you had formed an opinion.

A. Oh, yes.

Q. You have that opinion at this time?

A. Yes, sir.

Q. But now you feel even with this opinion you could set that all aside and sit here and listen what is presented in this court?

A. Yes, sir.

Q. Do you feel like there is no reason that anything you knew before would get in the way of your deliberations here?

A. I don't think it should.

Q. Well, I don't either, but -

A. Well, I am not sure I should answer yes or no. Would you rephrase that, please.

Q. Do you feel like, with all these accounts, and the opinion that you have, and the discussion with the other people, if you were selected for the jury could you set aside what you had heard and just render a verdict based solely on what was presented here in court, and not let anything else distract you or get in the way of your deliberations?

A. Yes, sir.

Q. You believe you could?

A. Yes, sir.

Q. Did you hear anything about the defendant's background, where he came from before he came to Fort Smith?

A. Yes, sir.

Q. What did you hear?

A. He was a South Carolinian, and he was wanted there.

Q. Do you know what he was wanted for?

A. Yes, sir.

Q. What is that?

A. Double murder.

Q. All right, do you recall anything about the alleged victims?

A. Other than they were young.

Q. You don't remember anything else?

A. Huh uh.

Q. Now, do you feel like it would take evidence on the part of the defendant to set aside this opinion you have? Something from the defendant's side of the case, or would you just be able to weigh what the State has presented?

A. Well, as I understand it, I would be required to judge solely on the State's evidence, and therefore that is, as I see it, the only thing.

Q. Do you feel that you would be able to presume the defendant innocent at this time despite your prior opinion, or the opinion you hold at this time?

A. Well, no, sir, I don't think he is innocent but I think the State would be required to prove that he is guilty.

Q. Now, are you telling me that, as a matter of law in our system of justice the defendant is presumed to be innocent, and that the burden is on the State to prove that he is guilty, and before he goes to trial that presumption stays with him. And I believe Mr. Karr discussed this with you.

A. Yes, sir, it stays with him and not necessarily

with me.

Q. You do not believe or presume this man to be innocent?

A. Well, sir, I don't - I didn't understand the question.to be that. As I understood the question was could I render a fair and impartial verdict.

Q. All right. Of course, I probably am phrasing it somewhat differently than what Mr. Karr did. So just listen to what I am saying. Of course, just listen to my question and just answer it the best you can. And I am asking you at this time if you feel that you can presume the defendant innocent at this time?

A. No, sir.

Q. You do not?

A. No, sir.

MR. SETTLE: Your Honor, I am going to present this man for cause.

THE COURT: All right, let me ask him. Under the law of this state every defendant in a criminal case is presumed to be innocent, and as you have heard several times the burden is upon the State to prove the guilt of any defendant beyond a reasonable

doubt. This presumption of innocence is actually evidence in behalf of the defendant, and stays with him until such time as the State is able to overcome their presumption and prove his guilty beyond a reasonable doubt. Now the Court tells you that that is the law, and that he is presumed to be innocent, and if you feel - and he is entitled to that presumption under the law. Now, if you honestly feel like you cannot presume his innocence the, of course, that is what we need to know. And if you feel like knowing that is the law, could you then follow the Court's instructions that that is the law, or do you feel like under the situation you could not presume his innocence at this time?

A. May I speak freely?

THE COURT: Yes, you man.

A. Well, let me then just discuss it with you, if I may. To be honest, I feel within myself that the defendant is guilty. It is hard to put that aside. But as to the question, yes, I can be

impartial, but the courts may assume his innocence, in other words, until he is proven guilty, but if he has already been tried and according to the evidence that I have heard and seen on television, I don't believe that I could honestly say that he is innocent, but I can be impartial. Am I clear?

THE COURT: Yes. But would the fact that he has been tried in Sebastian County and convicted by a jury up there, do you honestly feel that that would, that you would give that any weight or consider that in determining his guilt in this trial?

A. No, sir, it would have to be on the evidence presented here.

THE COURT: Now I know you are being entirely honest, and that is what I want you to be. But the Court will even instruct the jury at the close of the trial that under the law this defendant is presumed to be innocent, and it is evidence in his behalf, and he has no burden at all in this case.

Can you accept that as being the law and this defendant as he sits here now is innocent and will remain innocent under the law until such time as the State is able to prove his guilt beyond a reasonable doubt? If you can't, it is understandable. But if you can, that is what we need to know. Are you going to require him to establish his innocence?

A. Oh, no, sir.

THE COURT: You would not do that at all?

A. No, sir.

THE COURT: So would you put the entire burden on the State?

A. Yes, sir, that's where it belongs.

THE COURT: If he did not produce any evidence in his behalf, or any proof, would you hold him responsible, or would you look to the State to prove his guilt?

A. As I understand it, Your Honor, it is the State's burden to prove his guilt, and that then would be what I render a verdict on.

THE COURT: You don't have any problem about that, and you will place the burden on the State of Arkansas?

A. Oh, yes, sir.

THE COURT: Well, of course what we are back to again now, is can you in the starting out of the trial take the presumption that this man is innocent until he is proven guilty?

A. Well, I will state it this way, Your Honor. I think personally within myself, I think he is guilt. But yes, I can be impartial. Now, I don't know how we can resolve that.

THE COURT: Well, of course, as both of the attorneys have told you, the fact that you have an opinion at this time as to his guilt or innocence does not disqualify you as a juror. The test is whether or not you can legally lay all these matters that you think you might have read, heard or seen completely out of your mind and whatever might have occurred in the other trial, and come into this court and try this case solely upon the evidence that you would hear here.

And I believe you have answered, can you do that?

A. Yes, sir.

THE COURT: As Mr. Swindler sits here now, after I have told you what the law is, how do you regard him as far as the law is concerned? Do you regard him - I am not asking you about your opinion, but as far as the law is concerned, how do you regard him now as being innocent or guilty of this charge?

A. In the eyes of the court he is innocent.

THE COURT: In the eyes of the law?

A. Yes, sir.

THE COURT: Can you accept that?

A. Yes, sir.

THE COURT: Do you accept it?

A. Yes, sir.

THE COURT: All right, if you should be selected as a juror will you follow the Court's instructions as to that being the law in regard to him being innocent until such time as his guilt is established to your satisfaction, beyond a reasonable doubt?

A. Yes, sir.

THE COURT: Will you require the State in this trial to do that?

A. Yes, sir.

THE COURT: I believe he is good, so at this time I will overrule your motion for cause.

MR. SETTLE: Save my exceptions, Your Honor.

BY MR. SETTLE:

Q. All right, now Mr. Brickey, I assume at this time that you presume this defendant to be innocent?

A. In the eyes of the law.

Q. Your eyes, sir?

A. Oh, no, sir.

MR. SETTLE: We are right back to the same point.

MR. KARR: Your Honor, this is a legal presumption. On the one hand, we are talking about an opinion, if it is not a fixed opinion as to guilt or innocence, he says he has got one. But on the other hand, he fully understands that the presumption of innocence is a legal presumption here. You know, to tell him that he has got to completely accept that and then set aside, he would have

no opinion, it is contradictory. And he says he understands his legal principle and he gives that and says he sees him as innocent in the eyes of the law, and he will force the State to meet its burden of proving his guilt beyond a reasonable doubt. And I think it is just the way that Mr. Settle is asking the question now. He is asking him two different questions. He is asking one question and getting an answer to another one.

MR. SETTLE: No, Your Honor, I disagree with that. I think that maybe Mr. Bricksey feels like he can accept theoretically this idea, but I don't think that practically he can accept it. I think he is being honest and truthful about it, and I feel that just does not accept that concept and practice in this case.

THE COURT: As I understand it, he has an opinion as to the guilt of this defendant. He has freely admitted that. So as far as he is concerned, that opinion

at this time, as I understand him, is that the defendant is guilt. So now we are asking him if he regards him as being innocent, and it is contradictory to that extent. He can't have an opinion that he is guilty, and at the same time say he regards him as being innocent. And them I think the question must be as to whether or not, since I have told him what the law is, is whether or not he can lay aside his opinion at this time regardless, regarding this defendant as being innocent. Now, I can't resolve it either.

MR. SETTLE: Your Honor, I think what it is, I know Mr. Bricksey has an opinion, and I believe he is honestly trying to set it aside. But I think that this answer is that he cannot really set that opinion aside, and I think that is really, he is answering that other question. And on that basis, I will submit him.

THE COURT: Well, I don't want to ride a good

horse to death, but again, do you feel that you can set your opinion aside and try this case just on the law and the evidence?

A. Well, I have worked for the school, and I have a family, and I have teenage daughters. And I am active in church work, and a lot of times you may form an opinion, but it is always my duty to listen to my daghters, and usually they may have mitigating circumstances in their lives, you know, about why they have been disobedient or haven't listened to me. But I have always tried to listen, and it is my duty to listen, especially in church affairs, and things of that nature. And even though you may form an opinion, then you are still required to listen and make a decision on the evidence. And yes, I can do that.

THE COURT: Again, I am going to overrule your motion.

MR. SETTLE: Save my exceptions.

BY MR. SETTLE:

Q. All right, Mr. Bricksey, if you were selected for the jury do you believe that this information you have, information of the defendant's past

or whatever you heard about the incident, whatever you heard about the incident, you could set that completely aside?

A. Yes, sir.

Q. You would consider only what is presented in this court?

A. Yeah.

Q. You would follow the instructions of the Court?

A. Yes, sir.

Q. All right, you feel if you were deliberating if you were selected as a jury, if you were deliberating on the case do you feel that you would be comparing whatever accounts you remember with whatever the evidence was that was presented in court?

A. No, sir.

Q. You would just examine what was presented?

A. Yes, sir.

Q. Would it take any proof from the defendant's side to get any of these media accounts out of your mind? Would you require proof?

A. I don't think they could be removed from my mind, the accounts, once it is there. Would you rephrase your question, please?

Q. All right, if you were chosen as a juror and you were deliberating on the case, if your opinions, or these accounts were getting in the way of your

deliberations, would you report that to the Court?

A. After the case has gone to the jury? Please say that again.

Q. While you were deliberating on the case would you report to the Court if these previous opinion, or these previous reports and accounts were having any impact on your deliberations?

A. Yes, sir, I guess; I am not sure how the system works. I have served on a jury before but, what do you mean?

Q. Well, I mean if your impartiality was being threatened by these previous reports and opinions if you felt you could not be fully impartial.

A. Well, my impartiality would not be threatened.

Q. All right, are you related to any police officers or know any police officers?

A. I am not related to any that I am aware of.

Q. Do you know the local officers?

A. Oh, yes.

Q. Have they ever discussed this case with you?

A. Not to my knowledge.

Q. They have never expressed an opinion to you about this case?

A. Not the local police officers, no, sir.

Q. You have not discussed this with any other police officers?

A. No, sir.

Q. Okay, so if you were chosen as a juror you would not have to explain whatever verdict or sentence you came back with to them?

A. No, sir.

Q. You would feel that you could just make a decision without worrying about what somebody else would think?

A. That is the way it has always been.

Q. Now I am not sure, did you tell me where you were working? I think I may have missed that. Where did you say you were working?

A. I am a house painter and repairman.

Q. Yes, you did tell me that.

A. My wife and I.

Q. Now then the testimony may warrant the evidence and testimony presented in court may warrant that the Judge, the Court will instruct you on what are called lesser included offenses. Lesser included offenses of the homicide statutes. The most serious one is the one that the defendant is charged with, and it is capital felony murder. Lesser charges would be first degree murder, second degree murder or manslaughter. It would of course depend on what

the Court would feel would be appropriate. Now if the Court instructed you on these lesser offenses do you believe that you could consider them?

A. Yes, sir.

Q. I know Mr. Karr also discussed with you the procedure involved in one of these capital felony cases. Now I am just assuming for the purposes of this question, this is sort of hypothetical, but I am assuming that if you were selected for the jury, and assuming that the jury found the defendant guilty; now of course without having any of the evidence presented in court, without knowing what the State's case is going to be in court, do you feel that you could consider the penalty of life without parole as an alternative to the death penalty? Those are the two possible penalties in a case like this. The death sentence of life without parole. Do you feel you could consider life without parole?

A. Yes, sir.

Q. Do you feel you consider it equally with the death penalty?

A. Yes, sir.

Q. All right, now, referring to the police officers, I want to say that we anticipate that the State

will call some police officers to testify. Do you feel that you would weigh their testimony over a private citizen's, or would you weigh them equally?

A. Equally.

Q. You would weigh them equally; you would not give any greater weight to any person's testimony?

A. No, sir.

Q. Have you ever been a witness or a victim of a crime, or has any member of your family ever been a witness or a victim of a crime?

A. No, sir.

Q. All right, now do you feel if you were, assuming you were selected for the jury, when deliberating on a possible verdict, or a possible sentence that you could set aside whatever background information you had about the defendant and just concentrate on what is presented in court?

A. Yes, sir.

Q. Do you know of any reason why you could not give this defendant a fair trial on this case, along with the State?

A. No, sir.

MR. SETTLE: That's all.

MR. KARR: Mr. Bricksey is good for the State.

MR. SETTLE: Your Honor, I would like to resubmit him for cause. I believe he knows too much about the defendant's background, and I believe he has stated that he has a solid opinion in this case, and I believe his answers are contradictory on that basis, and I move he be excused by the Court.

THE COURT: I want to ask you about three more questions, and then I believe we can dispose of you one way or the other. You stated awhile ago that when I asked you in regard to the presumption of innocence, you said that under the law you could regard him as being innocent.

A. Yes, sir.

THE COURT: You also stated, of course, that you have an opinion at this time as to his guilt.

A. Yes, sir.

THE COURT: All right, you have answered and said that you could and would set that opinion aside if you should be selected, and that you would be able to, and would try the case

solely upon the evidence here in court?

A. Yes, sir.

THE COURT: Can you and will you follow the instructions of the Court as to what the law of this state is, and be bound by whatever instructions the Court gives you, whether you agree with them or not, if the Court tells you that is the law?

A. Yes, sir.

THE COURT: Will you do that, and can you do that?

A. Yes, sir.

THE COURT: All right, your motion for cause will again be overruled.

MR. SETTLE: Note my exceptions, Your Honor. Your Honor, he is excused.

THE COURT: All right, let's take our noon recess. Court is in recess until 1:30.

(The time now being 1:30 p.m. court is reconvened from the noon recess)

VOIR DIRE EXAMINATION OF R. C. MAXWELL

BY MR. KARR:

Q. Mr. Maxwell, do you know anything about the facts of this case?

NO. 89-6679

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER — PETITIONER

V.

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASONS FOR DENYING THE WRIT

I.

SWINDLER WAS AFFORDED EFFECTIVE COUNSEL.

Swindler first argues that he was afforded ineffective assistance of counsel at trial. He argues that counsel was ineffective in that he failed to investigate and offer evidence of mitigation at the penalty phase of the trial.

In order to succeed on a claim of ineffective assistance of counsel, Swindler must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

Swindler argues that counsel was ineffective for failing to put on allegedly mitigating evidence at the penalty phase of his trial. He asserts that counsel should have investigated and offered evidence at the penalty phase relating to a serious head injury sustained by Swindler in his youth. Swindler claims that evidence of the head trauma would have been relevant as a mitigating factor.

Lockhart notes that in the case of Darden v. Wainwright, 477 U.S. 168 (1986), this Court addressed a claim of ineffective assistance of counsel at the penalty phase of a capital murder case. It is clear that the Strickland

standards apply to the resolution of this issue. In Darden, the Supreme Court rejected the allegation of ineffective assistance of counsel because Darden had not overcome the presumption that it might be sound trial strategy to have a simple plea for mercy rather than present evidence in mitigation. Likewise, Swindler has failed to overcome that presumption in the present case.

The Arkansas Supreme Court rejected Swindler's claim in his petition for post-conviction relief because the argument was presented in a conclusory fashion Swindler, 272 Ark. 340, 344, 617 S.W.2d 1, 3 (1981).

While it is true that no evidence was presented at the penalty phase of the trial, counsel for Swindler testified at the evidentiary hearing that he believed that sufficient evidence had been offered at the guilt phase of the trial and that it was unnecessary to put on any additional evidence. (E.H. 27-30) Counsel also indicated that although the report from the State Hospital was available and could have been offered into evidence, he believed it was more damaging than helpful regarding mitigation. (E.H. 15)

Counsel's penalty phase closing appears in the record at T. 2224-36. Counsel argued that Swindler was under an emotional disturbance and that he had a mental condition. Counsel referred to the head injury Swindler had suffered as

a child. (T. 2230) Counsel argued the Swindler had been drinking the day of the shooting and, thus, that intoxication was a mitigating factor. (T. 2231) Counsel also referred to Swindler's lack of education. (T. 2232) Counsel mentioned the fact that Swindler had been in prison most of his life and that this made him unable to interact in society well. (T. 2233) Counsel also mentioned the abuse that Swindler claimed to have suffered upon being arrested. (T. 2233-34) Counsel pointed out that Swindler had not attempted to harm the witnesses to the shooting which counsel noted was common in many other cases. (T. 2235) Counsel also argued that the death penalty served no deterrent value. (T. 2235-36) A review of counsel's closing argument establishes that he mentioned those points in mitigation that had been developed at trial.

Counsel did not err in failing to put on evidence of mitigation. Swindler has not demonstrated any evidence that was available to counsel that was not offered to the jury and argued by counsel.

The District Court noted that Swindler had failed to show that any evidence existed which could have been introduced at his trial. Moreover, the District Court found that counsel had exercised reasonable trial strategy in not admitting the State Hospital report which contained damaging information. Swindler, 693 F.Supp. 766, 769 (E.D. Ark.

1988). See Petitioner's Appendix I at 42-43.

The Eighth Circuit rejected Swindler's claim as well. Swindler v. Lockhart, 885 F.2d 1342, 1352-53 (8th Cir. 1989). See Petitioner's Appendix I at 19-21. The Eighth Circuit properly applied the Strickland standards in reviewing Swindler's argument. Swindler has failed to demonstrate any basis for this Court to grant certiorari.

II.

SWINDLER'S SECOND MOTION FOR A CHANGE OF VENUE WAS PROPERLY DENIED.

As his second argument, Swindler argues that he was denied the right to be tried by an impartial jury when the trial court denied a motion for a second change of venue. Swindler argues that he was entitled to a second change of venue because of adverse pretrial publicity surrounding his case. The District Court in a thorough opinion on this issue denied habeas corpus relief. Swindler, 693 F.Supp. at 763-66. See Petitioner's Appendix I at 28-35. The District Court was correct in denying habeas corpus relief and Lockhart asserts that the Eighth Circuit properly affirmed the judgment.

Swindler's first conviction was reversed by the Arkansas Supreme Court because the trial court failed to grant a change of venue and because the court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978). On remand to the trial court, venue was moved to

Scott County from Sebastian County. At his retrial, Swindler made an oral motion for a change of venue for the first time on the first day of voir dire after only nine veniremen had been examined and excused for cause. The Swindler also moved for a mistrial. The trial judge denied the motions because it was not apparent to him that it would be impossible to seat an impartial jury in that county. (T. 751-52) Swindler renewed his motion for a change of venue or for a mistrial five times before the jury was selected in his case.

At the conclusion of the first day of voir dire, when no jurors had been selected, the trial court denied the renewed motion for two reasons: (1) Arkansas allowing only one change of venue to an adjoining county; and (2) the motion was premature, i.e., only twenty veniremen had been examined, Swindler had used only four peremptory challenges, and the State had used only two. The court believed that the better course was to continue the voir dire the next day and see what progress could be made toward selecting a jury. (T. 878-79)

After the second day of voir dire, two jurors had been selected. Swindler had exercised eight peremptory challenges and the State had exercised four. Swindler again moved for a change of venue or for a mistrial. (T. 1071-73) The trial court denied the motion as follows:

> Also, as you have correctly pointed out, under Arkansas law a defendant is only entitled to one change of venue, and the court feels that by the news media, and the advances that have been made, and the television, that perhaps there needs to be some changes perhaps made in the law.
>
> * * *
>
> I do want to proceed again tomorrow and see what progress, if any, can be made in the selection of the jury, then if the court is convinced that a jury cannot be obtained here, that jurors here do not have opinions or would be qualified to serve, then the court would face the legal matter as to whether or not the rights you assert under the United States Constitution are such that it could be done contrary to the provisions of law.

(T. 1074-75)

This quotation clearly reflects the trial court's willingness to consider a change of venue if it became apparent that an impartial jury could not be seated despite Arkansas' statute prohibiting a second change of venue.

After the third day of voir dire, five jurors had been seated. Swindler still had three peremptory challenges. Swindler again moved for a change of venue or for a mistrial. (T. 1213-14) Once again the trial court stated that the proper way to handle the case would be to continue jury selection the next day to see what progress could be made. (T. 1214) Although the court did not reiterate its reasons for overruling the motion, it gave Swindler the right to renew his motion at any time, depending on the

development toward the selection of the jury. (T. 1215)

At the conclusion of the fourth day of voir dire, ten jurors had been chosen. Swindler had exhausted eleven of his peremptories and the State had exhausted six of its challenges. Swindler moved the court to declare a mistrial and to change the venue to another county where he could obtain a fair trial by a impartial jury. (T. 1405-07) The trial court overruled the motion with the following remarks:

> We have been able to seat ten jurors, and the Court has tried as best I know how to excuse any juror that I did no feel, or that I felt should be excused, based on the vast amount of publicity this matter has received. So for the purpose of the record I am not granting our motion today, based on the fact not particularly on the fact of the constitutional question of the law, but on the fact that I feel like that we are making good progress towards getting a jury, one that will be qualified under the case.

(T. 1408-09)

After the fifth day of voir dire, twelve regular jurors and one alternate juror had been chosen. Swindler had exhausted all twelve of his peremptory challenges in the selection of the regular jurors and had exhausted his one peremptory challenge in the selection of the alternate juror. The State had exhausted seven of its peremptory challenges. Swindler once again renewed his motion for mistrial because of jury bias and prejudice and based on the

unconstitutionality of the venue statute. (T. 1528) Swindler then moved to introduce defense Exhibits 1-5 which showed the following: the population of Scott County; the jury lists for the week together with defense counsel's notations regarding those who had been excused for cause, by peremptory strikes, etc.; a list of additional prospective jurors drawn; and a list of prospective jurors excused for business or personal reasons. The exhibits were admitted into evidence. (T. 1542-55) However, the trial court again overruled Swindler's motion with the following comments:

> Again, it is of course apparent, it is quite obvious that this case has received great amounts of publicity, and it is very difficult to find a juror, not only Sebastian County but apparently throughout this part of even the western part of Arkansas, who had not read, heard or seen a great deal about it. And the Court was confronted with the proposition with the publicity that; has been received to try to see that a jury was selected under the circumstances that no opinion about the case or were able to set it aside. And I feel that the Court when there was any doubt or any question at all in that regard has resolved it by excusing the jurors. so I going to hold, Mr. Langston, and the Court understands of course that what you are asking this court to do is to declare the Arkansas statute unconstitutional, and uphold that this case must be transferred to some county not an adjoining county but outside the district, which the Court believes would cause a serious jurisdictional problem. But I am holding that based upon the present Arkansas law and the record that was made in this court in the selection of the jury that your motion should be

denied, and it will be denied in this case.

(T. 1559-60)

To review, 120 jurors were examined on voir dire in Swindler's case for the selection of the twelve regular jurors. Of those 120 jurors, 79 were excused for cause. However, four were excused for cause by the State because of their opposition to the death penalty. The District Court also correctly noted that a number of the potential jurors were excused for reasons not related to pretrial publicity about the crime. Swindler, 693 F.Supp. at 764. See Petitioner's Appendix I at 30-32. Swindler excused twelve peremptorily and the State excused seven peremptorily.

It is also important to note that Swindler's retrial was held in October of 1978. The crime had occurred in September of 1976. Thus, more than two years had passed between the crime and the second trial.

The twelve regular jurors chosen in Swindler's case were:

1. Robert Oliver (T. 955-66)
2. Henry Sunderman (T. 971-8)
3. Gean Roderick (T. 1097-1115)
4. Thurman Jones (T. 1146-64)
5. Leonora Pica (T. 1187-98)
6. Bobby Hunt (T. 1204-20)
7. Milton Staggs (T. 1222-40)
8. Walter Goodard (T. 1254-67)
9. Ardell Martin (T. 1267-84)
10. L. D. Casey (T. 1324-37)
11. Cora Owens (T. 1413-28)
12. John Sherrill (T. 1477-78)

Of these twelve jurors, all twelve were ultimately announced

"good" by both Swindler and the State. However, Swindler did move to excuse three of the twelve for cause before they were accepted. (Sunderman, T. 985; Jones T. 1153-64; Staggs, T. 1240-41). The Swindler had peremptory challenges remaining in each instance and did not exercise them. The thirteenth juror (alternate) was Mary Wilson (T. 1489-99). She was excused from service before the deliberations began.

Lockhart acknowledges that approximately 66% of the 120 jurors examined were excused for cause. However, Lockhart maintains that the jury selected to hear Swindler's case was fair and impartial. The voir dire establishes that Swindler was not entitled to a change of venue because the jurors seated in the Swindler's case could give him a fair trial.

On direct review, the Arkansas Supreme Court rejected Swindler's argument that he had been tried by an impartial jury and upheld the trial court's determination that the Swindler was not entitled to a change of venue. Swindler v. State, 267 Ark. 418, 424-28, 592 S.W.2d 91, 94-96 (1979).

It is clear beyond all question that the trial court's determination as to the individual juror's qualifications to be seated in a particular case is subject to the presumption of correctness of 28 U.S.C. §2254(d). In Patton v. Yount, 467 U.S. 1025 (1984), this Court specifically addressed the issue of alleged bias due to pretrial publicity. The Court

held that a trial court's finding that the jurors were qualified to be seated is a factual finding subject to the presumption of correctness. Thus, the District Court properly applied the presumption of correctness to the state court's findings of fact in this case.

In the case of Irvin v. Dowd, 336 U.S. 717, 722-23 (1961) this Court noted as follows:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can a lay aside his impression or opinion and render a verdict based on the evidence presented at court.

The Supreme Court has addressed the pretrial publicity issue on numerous occasions since that time. See Dobbert v. Florida, 432 U.S. 368 (1979); Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966). The gist of these cases is that the defendant must demonstrate the nature and extent of the publicity that he claims biased the jury. There is no evidence in Swindler's trial record to establish the nature and extent of the pretrial publicity. The only evidence in the record at all is that gleaned from the answers of the prospective jurors on voir dire. Although it is true that as many as 98 of the 120 jurors did have some knowledge of Swindler's case, that is

simply not enough to establish that the jury was impartial under the rule announced in Irvin and in the cases following Irvin.

As outlined above, an examination of the voir dire of the twelve seated jurors clearly establishes that each could render a verdict based on the evidence presented. That is sufficient to establish the impartiality of Swindler's jury. Because Swindler cannot demonstrate that he was tried by a biased jury, he cannot establish that the location (venue) of his trial was improper.

Based on the foregoing argument, Lockhart asserts that the District Court was correct in concluding that Swindler was not entitled to a second change of venue. Therefore, the Eighth Circuit properly affirmed the judgment denying habeas corpus relief. See Swindler, 885 F.2d at 1347-48. See Petitioner's Appendix I at 7-11. As such, Swindler has failed to establish any reason for this Court to exercise its certiorari jurisdiction.

III.

JURORS SUNDERMAN, JONES AND STAGGS WERE PROPERLY SEATED ON SWINDLER'S JURY.

Finally, Swindler argues that his rights under the Sixth and Fourteenth Amendments were violated because certain jurors were seated after he had exhausted his peremptory challenges who were biased against him and who should have been excused for cause.

Swindler correctly notes that he exhausted his peremptory challenges when he excused venireman John Montgomery (T. 1465). At that point, eleven jurors had been seated. However, contrary to his argument, the record does not reflect that any jurors were seated after he had exhausted his peremptory challenges that he would have excused if he still had peremptory challenges remaining. Each of the jurors about whom Swindler complains - Henry Sunderman (T. 971-85), Thurman Jones (T. 1146-64), and Milton Staggs (T. 1222-40) - were challenged for cause before Swindler exhausted his peremptory challenges. Thus, when the trial court denied his for-cause challenge, Swindler could have excused the jurors peremptorily but did not. Instead, he accepted each of the three jurors as being "good" for the defense. (T. 985, 1163-64, 1240-41)

Arkansas follows the rule that in order to demonstrate prejudice from the denial of a juror challenge, a defendant must establish that, after he exhausted all of his peremptory challenges, he was forced to accept a juror that he would have excused if he had had a peremptory challenge remaining. See Fairchild v. State, 284 Ark. 289, 292, 681 S.W.2d 380, 382 (1984); Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981); Conley v. State, 270 Ark. 886, 607 S.W.2d 328 (1980). Swindler has failed to make such a showing.

However, Lockhart notes that the record in this case establishes that the trial court correctly denied Swindler's for-cause challenge in the case of each of the three disputed jurors. Swindler claims that each juror should have been excused for cause based on his opinion as to his guilt. Once again, Lockhart asserts that the language found in Irvin v. Dowd, 366 U.S. 717, 722-23 (1961) is appropriate here. The Court stated that:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court.

Moreover, the trial judge's decision not to excuse the three jurors is entitled to the presumption of correctness accorded a state court's findings of fact.

An abstract of the voir dire of each of the three questioned jurors is submitted below:

A.

Henry Sunderman testified as follows:

The only thing I know about this case is what I read in the newspaper and T.V. I do not have an opinion about the

case. I work at SWEPCO here in Waldron and have for 16 years. (T. 971-972)

I remember from the news accounts that the altercation that took place was at a service station and I remember the names that were mentioned, and the T.V. and news accounts of this. The names that I remember were Randy Basnett and Mr. Swindler. I was living in Scott County at the time and I saw this on television. I get the cable and I was watching this on Channel 5 from Fort Smith. I watch the news every day. I usually look through the newspaper every day. I remember that Mr. Swindler was from North or South Carolina. I remember that there were some charges that had been brought against him in that state. I remember it was some sort of assault charges. (T. 975-977)

I talked to other people and discussed the case. Other people expressed opinions to me about it. The ones that discussed it with me, particularly, I would say, after the trial that they were convinced. This was discussed like any other news item. People still express their opinions to me. The majority of them were that they felt that he was guilty. No one to my recollection stated that he was not guilty. I would say that I probably did express an opinion when I was discussing the case. At that particular time I feel that I was of the opinion that he was guilty. I did not hear all the evidence at that time, and based on what I

did hear at the particular time I had an opinion at that time; at this time I would base my opinion on the evidence that was presented. (T. 977-979)

I followed the reports of this case when it was first tried to some degree. I feel like any jury that hears the evidence that is presented to them, twelve people come to the same conclusion, that I feel like, they have made a decision based on what the facts that there were aware of. I would say that I feel like because they came to the conclusion that the defendant was guilty, that he may well be guilty. I have the opinion that the twelve, based on the facts that were presented to them, made a decision based on those facts. I had my opinion at that time, and I feel like if I sit on any jury, it would be my duty to make my decision at that time, based on the facts that were presented to me, not what had been presented somewhere else. I would not consider what another jury had considered and what their verdict was. (T. 979-980)

I hope my prior opinion would not prevent me from weighing the evidence. I hope it would not get in the way of my deliberations. I think I cannot tell you that a thought would not cross my mind. I would do my best not to compare whatever evidence was presented in court to whatever I heard from the media. I don't think I could tell you without a shadow of doubt that I would not compare the

evidence with what I heard in the media. (T. 980-981)

If I were sitting on the jury I would weigh the evidence that was presented to me in the courtroom, and not what had been carried on T.V. or in the newspaper. (T. 981-982)

The defendant moved that the juror be excused for cause and the trial court overruled the motion and he was selected as a juror. (T. 985)

B.

Thurman Jones testified as follows:

The facts I know about the case are from newspaper and television. I subscribe to the Fort Smith paper. The only opinion I could form is that the man was guilty because the jury found him guilty. I guess I have that opinion right now. I would hope that it would be true that I could set aside my opinion. I didn't hear the evidence before and I don't know what they based that decision on. I think I could base my decision on what happens here. (T. 1146-47)

I am not too hep on the death penalty, but I think in certain cases I would believe in it. In some kind of cases I think it is a proper punishment. It would have to be an extreme case before I would go for the death penalty. (T. 1148)

I have seen this case on T.V. and in the newspaper. I read accounts of it in the Fort Smith Times Record. I have not completely read an account until yesterday. The only

complete article I have read in this case I read just yesterday. I remember from the account that a police officer was shot in Fort Smith. I read where the man took off and they caught him down in the bottoms. And that they arrested the man, and put him in jail. And then they sent him to Little Rock for a sanity test for 30 days. I also read that he was accused of killing two more in South Carolina. I heard they were teenagers. I guess I discussed the case with other people. I have had several people express their opinion in my presence. If they had told me he was guilty on anything, it wouldn't amount to anything as far as I am concerned. That is their opinion. I never heard anyone say that he was not guilty. (T. 1152-1154)

I formed the opinion when he was convicted that he was guilty. I am referring to the trial in Sebastian County. It is not for me to decide whether he needs a second trial; that is up to the Supreme Court to decide that. So that is not my prerogative. I cannot give this man the same presumption of innocence that I could have had he not been convicted. I am not saying that I cannot presume him innocent. The only thing, I have not considered in my mind whether or not the man is guilty or innocence (sic). The only thing I assume I don't know of any other assumption I could be under with what I have hard, and read, except that he was guilty. That is my opinion. (T. 1155-1156)

What I have told you before is I would take what happened in this courtroom, and when the Judge gives the instruction to the jury I would follow the Judge's instructions and the law to the best of my ability. I don't think that it would be necessary for me to be able to put out of my mind what I have read or heard. My mind is not something I erase one morning, and get up the next morning and start writing it again. My mind doesn't operate that way. I wouldn't be remembering what I have heard. When I told you that if I was put on that jury I would listen to what was said, and base my opinion on that. I don't think I would consider anything I had heard. I don't know anything about the evidence of the previous trial. (T. 1156-1158)

The defendant moved to excuse the juror for cause and stated as grounds that he thought his answers had been contradictory, and that he had too much information about the defendant's background. (T. 1163-1164) The motion overruled by the trial court. He was selected to serve on the jury. (T. 1164)

C.

Milton Staggs testified as follows:

I heard a little bit about the facts on the news, read a little in the paper. I don't really know how to answer the question of whether I have an opinion or not. Based on what came out I do have an opinion. I don't know how it could be

otherwise. I believe I could set my opinion aside. (T. 1222-1223)

I just saw some of the skits on T.V. about the case, I read the Fort Smith Times Record paper about it. I just get Channel Five from Fort Smith. I remember from the accounts about a policeman getting shot, and really I didn't keep up with a lot about the trial situation. I did some, but I couldn't offhand tell you. That's all I did. I kept up and say that caught a person. They got the person they said did it and it was Swindler the defendant. (T. 1230-1232)

I probably did discuss this case with my wife. I did discuss it some with other people. I really didn't express an opinion to anyone else. I did hear about another incident or two about the defendant, someone was telling me about it. I just heard there was two more people that had been killed by him. (T. 1232-1233)

Based on what I have heard and seen, I would have to have a little bit of an opinion. My opinion would be that it would have to be like it came out. I have an opinion to an extent. Not that I couldn't change it if it was different, but you would have to some confidence in the people. I don't believe I would have difficulty getting rid of my opinion. I can accept facts. I would not require anything from the defendant before I set aside my opinion. I wouldn't pay any attention to my opinion, because if I

listen to that, I would listen to the facts that are brought out. I would only want to hear what went on at the present. (T. 1235-1236)

The defendant moved that the juror be excused for cause. (T. 1240) The motion was overruled and he was selected as a juror. (T. 1241)

Although a review of the voir dire of the three jurors does reflect that each juror had some motion that Swindler was guilty based on what he had heard, each juror also stated that he could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Thus, under the rule announced in Irvin v. Dowd, supra, Lockhart asserts that each of the challenged jurors was properly seated on Swindler's jury. Moreover, when the presumption of correctness is applied to the state court's determination that the jurors were properly seated, Swindler's arguments must be rejected.

In reviewing this claim, the District Court applied the presumption of correctness and the standard set out in Irvin v. Dowd, supra. The District Court also stated that it had reviewed the voir dire and found no manifest error. Swindler, 693 F.Supp. at 766. See Petitioner's Appendix I at 35-36. The Eighth Circuit affirmed the District Court's judgment finding that the presumption of correctness was properly applied to the trial court's determination that the

jurors should not be excused. The Eighth Circuit determined that there was fair support in the trial record for the trial judge's decision to seat the questioned jurors. Swindler, 885 F.2d at 1348-50. See Petitioner's Appendix I at 12-15.

Based on the foregoing, Lockhart asserts that this Court should deny certiorari.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: Jack Gillean

*JACK GILLEAN
Bar Reg. #83073
Assistant Attorney General
200 Tower Building
4th and Center Streets
Little Rock, AR 72201
(501) 682-5321

ATTORNEYS FOR RESPONDENT

*Counsel of Record

STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
200 TOWER BUILDING
4TH & CENTER STREETS
LITTLE ROCK, ARKANSAS 72201
(501) 682 2007

February 28, 1990

Mr. Joseph Spaniol, Jr.
Clerk
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

RE: John Edward Swindler v. A. L. Lockhart
No. 89-6679

Dear Mr. Spaniol:

Please find enclosed for filing are twelve copies of the respondent's brief in opposition to the petition for writ of certiorari in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

Jack Gillean

JACK GILLEAN
Assistant Attorney General
(501) 682-5321

JG:dc
enclosure

cc: Honorable Thurman Ragar, Jr.
Attorney at Law
P.O. Box 796
Van Buren, AR 72956-0796

NO. 89-6679

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER — PETITIONER

V.

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION — RESPONDENT

CERTIFICATE OF SERVICE

I, Jack Gillean, a member of the Bar of the Supreme Court of the United States and counsel for record for respondent herein, hereby certify that on February 28, 1990, pursuant to the Rules of the Supreme Court, I served one copy of the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari, on the petitioner herein as follows:

By depositing copies of the brief in the United States Post Office, Little Rock, Arkansas, with first class postage prepaid, properly addressed to the Honorable Thurman Ragar, Jr., P.O. Box 796, Van Buren, Arkansas 72956-0796, the petitioner's counsel of record.

SUPREME COURT OF THE UNITED STATES

JOHN EDWARD SWINDLER *v.* A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-6679. Decided April 23, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

A defendant's interest in a fundamentally fair trial outweighs the State's interest in trying the defendant in a particular venue. See, *e. g.*, *Lee* v. *Georgia*, —— U. S. —— (1988) (MARSHALL, J., dissenting from denial of certiorari). Accordingly, state laws that restrict a court's ability to protect a defendant from the possibility of juror exposure to prejudicial publicity unconstitutionally infringe on a defendant's right to a fair and impartial jury. Relying in part on its interpretation of Arkansas law, see Ark. Code Ann. § 16-88-207 (1987) ("In no case shall a second removal of the same cause be allowed"), the trial court in this capital case refused to allow petitioner a second change of venue. I would grant the petition for certiorari to provide much needed guidance regarding the minimal due process requirements for state change of venue rules. When, as here, a State frames its venue rule in absolute terms and fails to permit the trial court to consider a particular defendant's right to a jury free from preconceptions regarding his guilt, such a rule violates due process. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 352 (1966) ("'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that

prejudice will result that it is deemed inherently lacking in due process'") (quoting *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965)). Even if I did not believe that this case merited plenary review, I would grant the petition for writ of certiorari and vacate the death penalty, because I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting).

Petitioner was convicted of murdering a police officer and sentenced to death. His conviction was reversed by the Arkansas Supreme Court because of the trial court's failure to grant a change of venue from Sebastian County, where the killing occurred. *Swindler* v. *State*, 264 Ark. 107, 113, 569 S. W. 2d 120, 123 (1978). Petitioner was thereafter retried in Scott County, a small rural county adjacent to Sebastian. Waldron, the seat of Scott County, is only 45 miles south of Fort Smith, the location of both the crime and the first trial.

During *voir dire*, a majority of the 120 venirepersons indicated that they were aware that petitioner had previously been found guilty of the crime, and that he was wanted in another state for allegedly murdering two teenagers. More importantly, an overwhelming majority of the venire—98 out of 120—either tentatively or firmly believed that petitioner was guilty. The strong local feelings regarding petitioner's guilt are reflected in the comments of venireperson Thomas Bricksey:

> "Q. [H]ave you discussed this case with anybody?
> A. Oh, yes, sir.
> Q. All right, and have these people expressed an opinion to you about this case?
> A. Yes, sir.
> Q. Could you tell me what those opinions were? Did they think the defendant was guilty?
> A. I am afraid it was almost unanimous.

Q. Did you ever hear anybody state that they thought he was not guilty?
A. No sir." Tr. 1299.

Similar prejudicial attitudes surfaced in the *voir dire* of three other jurors whom petitioner challenged for cause but who, unlike Bricksey, ultimately served on petitioner's jury. Each indicated that he believed petitioner was guilty as a result of exposure to pretrial publicity regarding petitioner's first trial. One of the jurors, Thurman Jones, when asked whether he accepted the principle that a person is innocent until proved guilty, replied, "I do, and I would accept it more if he had not been tried. The only thing I am wondering about now, since he has had a trial, and I know about it, I am wondering if he is not going to have to prove to me that he is innocent." Tr. 1149. Milton Staggs, another juror challenged by petitioner, when asked whether he had an opinion about the first verdict, stated, "Well sure, based on what came out, I don't know how it could be otherwise, you know." Tr. 1223. Henry Sunderman, asked whether "you feel like because [the first jury] came to that conclusion that the defendant may well be guilty," replied "I would say yes." Tr. 979. The trial court, finding that each of the three challenged jurors was capable of setting aside his opinion regarding petitioner's guilt, denied petitioner's request that they be struck for cause.

During the five days of *voir dire*, petitioner requested a change of venue on several occasions. The trial court denied the motions, relying in part on the Arkansas venue statute, § 16–88–207. Tr. 878–879; 1407–1408; 1560. At other points, the trial judge rejected the venue change in apparent reliance on "the fact that [petitioner] still ha[d peremptory] challenges left," Tr. 1075, although petitioner exhausted his challenges before the entire jury was seated. At the close of jury selection, petitioner moved for a mistrial on the ground that the state statute prohibiting a second change of venue

unconstitutionally deprived him of a fair and impartial jury. The trial court conceded that "it is quite obvious that this case has received great amounts of publicity, and [that] it is very difficult to find a juror, not only [in] Sebastian County but apparently throughout this part of even the western part of Arkansas, who have [sic] not read, heard or seen a great deal about it." Tr. 1559. The court nonetheless denied the motion on the basis of "the present Arkansas law and the record that was made" during jury selection. Tr. 1560.

Petitioner filed a petition for habeas corpus. The district court denied relief and the Court of Appeals for the Eighth Circuit affirmed, rejecting petitioner's claim that his constitutional right to a fair and impartial jury was compromised by the trial court's refusal to change venue or to strike for cause jurors Jones, Staggs, and Sunderman. 885 F. 2d 1342, 1347–1350 (1989). The court afforded a "presumption of correctness" to the state court findings regarding the ability of jurors to set aside whatever prejudice they harbored against petitioner. *Id.*, at 1347. The court also relied on Eighth Circuit precedent, *Simmons* v. *Lockhart*, 814 F. 2d 504 (1987), in which the court had stated that "the fact that a venire panel is well informed on reported news is not by itself prejudicial." *Id.*, at 510. Lastly, the court rejected petitioner's constitutional challenge to Arkansas's change of venue rule because "the trial court based its denial of a second change of venue on the fact that Swindler had not established prejudice resulting from pretrial publicity." 885 F. 2d, at 1347.

We have yet to address squarely the constitutionality of state change of venue rules that limit a trial court's ability to protect a defendant from the effects of prejudicial publicity.* Here, the Court of Appeals attempted to avoid the

---

*The fact that petitioner's claim in this case arises on a federal petition for habeas corpus does not bar its consideration. Cf. *Teague* v. *Lane*, —— U. S. —— (1989). Assuming that the rule sought by petitioner is "new," it also falls within the category of "procedures without which the likelihood

constitutional question by relying on the trial court's finding that the impaneled jury was not unduly prejudiced. But the Court of Appeals failed to consider the extent to which the Arkansas rule affected the trial court's assessment of prejudice. The transcript makes clear that the Arkansas rule was a strong factor in the trial court's decision and that the court had difficulty separating its merits judgment from its fear that a transfer of venue to another county "would cause a serious jurisdictional problem" under Arkansas law. Tr. 1560.

The state court's refusal to transfer venue may have been substantially affected by Arkansas's venue rule. When, on the basis of such rules, a court fails to protect the defendant from a trial that may be "but a hollow formality," *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963), this Court has a special obligation to consider their constitutionality and to specify the due process constraints on their application. I dissent.

---

of an accurate conviction is seriously diminished." *Id.*, at ——. The likelihood of an accurate conviction is no doubt diminished when a defendant is tried by a jury that has prejudged his case.